TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 355

FRANK COLLIS BOWERS, AS EXECUTOR OF THE ESTATE OF FRANK K. BOWERS, FORMERLY UNITED STATES COLLECTOR, ETC., PETITIONER

vs.

LAWYERS MORTGAGE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 5, 1931
CERTIORARI GRANTED OCTOBER 26, 1931

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1 In United States Circuit Court of Appeals for the Second Circuit

L. 36/348

LAWYERS MORTGAGE CO.

vs.

FRANK K. BOWERS, COLLECTOR OF INTERNAL REVENUE

Statement under rule 13, par. 4

This suit was commenced December 29, 1925.
The name of the original parties remain the same.
Complaint filed January 5, 1926.
Answer filed June 16, 1926.
Trial was had January 29, 1929, before Honorable Frank J. Coleman, without a jury, upon written stipulation waiving jury.
Verdict directed for plaintiff, August 3, 1929.
Judgment entered October 22, 1929.
Appeal on behalf of defendant taken January 9, 1930.
Bill of exceptions filed March 21, 1930.

2 In United States District Court, Southern District of New York

L. 36/348

LAWYERS MORTGAGE COMPANY, PLAINTIFF

against

FRANK K. BOWERS, COLLECTOR OF INTERNAL REVENUE, DEFENDANT

Summons

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the honorable Augustus N. Hand, judge of the District Court of the United States for the Southern District of New York, at the city of New York, this 29th day of December, A. D. 1925.

[SEAL.] ALEX GILCHRIST, Jr., *Clerk.*

SHEARMAN & STERLING,
Plaintiff's Attorney.

Office & post office address: 55 Wall St., Borough of Manhattan, city of New York.

3 In United States District Court, Southern District of New York

[Title omitted.]

Complaint

The plaintiff for its complaint herein alleges:

For a first cause of action

I. The plaintiff is a corporation incorporated in 1893 as a title and credit guaranty corporation under Article 5 of the Insurance Law of the State of New York. During the year 1913, its certificate of incorporation was duly amended, with the consent of the Superintendent of Insurance, to set forth its purposes and powers as follows, under which it has since acted:

"Second: That it is our intention to form a corporation for the purpose of examining titles to real property and chattels real, to procure and furnish information in relation thereto, make and guarantee the corrections of searches for all instruments, liens or charges affecting the same, guarantee or insure the payment of bonds and mortgages, or notes of individuals or partnerships secured by
4 mortgages upon real property situated in this or any other State, and bonds, notes, debentures and other evidences of indebtedness of solvent corporations secured by deed of trust or mortgage upon real property situated in this or any other State, invest in, purchase and sell, with such guarantee or with guarantee only against loss by reason of defective title or incumbrances, bonds and mortgages, and notes of individuals or partnerships secured by mortgages upon improved and unincumbered real property situated in this or any other State worth fifty per centum more than the amount loaned thereon, and bonds, notes, debentures and other evidences of indebtedness of solvent corporations secured by deed of trust or mortgages upon improved and unincumbered real property situated in this State or outside of this State worth fifty per centum more than the amount loaned thereon, and guarantee and insure the owners of real property and chattels real and others interested therein against the loss by reason of defective titles thereto and other incumbrances thereon."

II. The defendant is the United States collector of internal revenue for the second district of New York.

III. On or about October 19, 1922, the plaintiff paid to the defendant $10,147 as an alleged capital-stock tax, pursuant to the provisions of section 1000 of the revenue act of 1921, for the period from July 1, 1922, to June 30, 1923, inclusive.

5 IV. Subdivision (b) of the said section 1000 of the said act expressly exempted from the said capital stock tax "any in-

surance company subject to the tax imposed by section 243 or 246"; and section 246 imposed upon "every insurance company (other than a life or mutual insurance company) a tax" expressly declared to be in lieu of the taxes imposed by sections 230 and 1000.

V. Thereafter, on or about October 31, 1923, the plaintiff filed with the defendant a claim for the refund of the said payment of $10,147, on the ground that, being an insurance company, it was not subject to the said alleged capital stock tax, which claim for refund was denied on or about August 20, 1925.

For a second cause of action

VI. The plaintiff repeats and realleges each and every allegation contained in Articles I, II, and IV of the first cause of action.

VII. On or about August 31, 1923, the plaintiff paid to the defendant $10,731 as an alleged capital stock tax pursuant to the provisions of section 1000 of the revenue act of 1921 for the period from July 1, 1923, to June 30, 1924, inclusive.

VIII. On or about October 31, 1923, the plaintiff filed with the defendant a claim for the refund of the said payment of $10,731, on the ground that, being an insurance company, it was not subject to the said alleged capital stock tax, which claim for refund was denied on or about August 20, 1925.

6 Wherefore the plaintiff demands judgment against the defendant for $20,878, with interest on $10,147 from October 19, 1922, and on $10,731 from August 31, 1923.

SHEARMAN & STERLING,
Attorneys for plaintiff.
55 Wall Street, New York, N. Y.

[*Duly sworn to by Francis K. Raynor; jurat omitted in printing.*]

In United States District Court

[Title omitted.]

Answer

The defendant, by Emory R. Buckner, United States attorney for he Southern District of New York, his attorney, answering the omplaint in the above-entitled cause:

1. Denies that he has any knowledge or information sufficient to orm a belief as to the truth of each and every allegation contained paragraph I of the complaint.

2. Denies that he has any knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph I of the complaint, repeated and realleged in paragraph VI of the complaint.

8 Wherefore the defendant demands judgment dismissing the complaint together with the costs and disbursements of this action.

EMORY R. BUCKNER,
United States Attorney for the Southern District of New York,
Attorney for Defendant.

Office and post-office address: U. S. Courts and P. O. Bldg., Borough of Manhattan, city of New York.

9 [*Duly sworn to by Nathan R. Margold; jurat omitted in printing.*]

10 In United States District Court, Southern District of New York

LAWYERS MORTGAGE COMPANY, PLAINTIFF

against

FRANK K. BOWERS, COLLECTOR OF INTERNAL REVENUE, DEFENDANT

Judgment

The issues in this action having been regularly brought on for trial before honorable Frank J. Coleman, a judge of this court at a civil jury term thereof held on January 29, 1929, at the court house in the United States Post Office Building, in the Borough of Manhattan, city of New York, and the respective parties appearing by their attorneys, and the court having heard the allegations and proofs of the parties, and after due deliberation, the court having duly made and filed its decision on October 9, 1929, containing a statement of the findings of fact and the conclusions of law thereon, wherein it was provided that plaintiff is entitled to recover from the defendant the sum of $10,147, paid by it to the defendant on July 29, 1922, and the sum of $10,731, paid by it to the defendant on August 31, 1923, principal amounts, together with interest upon each thereon from the dates of payment as aforesaid as required by law, with costs actually incurred for witnesses and for summoning the same,
11 and fees paid to the clerk of the court, and plaintiff's costs having been duly adjusted at $30.00,

Now, on motion of Shearman & Sterling, attorneys for the plaintiff, it is

Adjudged that the plaintiff, Lawyers Mortgage Company, recover of the defendant, Frank K. Bowers, collector of internal revenue,

the sum of $20,878.00 principal amount, together with interest on $10,147.00 from July 29, 1922, and with interest on $10,731.00 from August 31, 1923, according to law, and its costs as taxed, the sum of $30.00, and that execution issue therefor.

Judgment this 22nd day of October, 1929.

ALEX. GILCHRIST, Jr., *Clerk.*

12 In United States District Court

[Title omitted.]

Certificate of probable cause

The plaintiff having commenced this action by personal service of a summons and complaint upon the defendant, and the defendant having appeared herein by the United States attorney for the Southern District of New York, his attorney, and judgment having been entered herein on the 22nd day of October, 1929, in favor of Lawyers Mortgage Company and against the defendant, Frank K. Bowers, collector of internal revenue, in the sum of $20,878.00 principal amount, together with interest on $10,147.00 from July 29, 1922, and with interest on $10, 731.00 from August 31, 1923, according to law, together with the costs of this action, said costs amounting to $30.00,

Now, therefore, pursuant to section 989 of the Revised Statutes of the United States, I hereby certify that there was probable cause for the acts done by the defendant, the collector of internal revenue, wherefor said judgment is due and recoverable against him.

13 Dated, New York, N. Y., Nov. 1st, 1929.

WOOLSEY,
United States District Judge.

Consented to:

CHEARMAN & STERLING,
Attorney for Plaintiff

Filed Nov. 1/29.

14 In United States District Court, Southern District of New York

L. 36/348

LAWYERS MORTGAGE COMPANY, PLAINTIFF

vs.

FRANK K. BOWERS, COLLECTOR OF INTERNAL REVENUE, DEFENDANT

Defendant's bill of exceptions

NEW YORK, *January 29, 1929.*

Above action was tried before the Hon. Frank J. Coleman, U. S. district judge, in his chambers in the Woolworth Building, at 2.30

p. m., tried by the court without a jury, pursuant to stipulation, in writing, filed herein.

Appearances of counsel

Messrs. Shearman & Sterling, attorneys for plaintiff, by H. W. Forbes, Esq., of counsel.

Hon. Charles H. Tuttle, U. S. attorney, attorney for defendant; Samuel C. Coleman, Esq., of counsel, assistant U. S. attorney.

Offers in evidence

Mr. FORBES. I offer in evidence the following paragraphs of the stipulation which has been filed with the court, dated January 17, 1929: Nos. 1, 4, 5, 8, 9, 10, 11, 12, 16, 17, 18, 21, 22, and 23.

15 I should also like to offer in evidence a copy of a letter addressed to the plaintiff by the Treasury Department under date of December 5, 1924, relating to the claims in question [referring to Exhibit W].

Mr. COLEMAN. Objected to as irrelevant and immaterial.

The COURT. It is taken with an exception.

Mr. COLEMAN. I offer in evidence paragraphs of the stipulation No. 2, 3, 6, 7, 13, 14, 15, 19, 20, and 24, with the exhibits that are referred to in the stipulation.

Mr. FORBES. Objected to.

The COURT. Objection overruled.

(Exception.)

Mr. COLEMAN. I also offer in evidence a scrap book kept by the secretary of the plaintiff, which contains all newspaper and pamphlet advertisements issued by the plaintiff during the years in question.

Mr. FORBES. Objected to.

The COURT. It is accepted in evidence with an exception to the plaintiff, and when the case goes up on appeal an arrangement may be made for offering the articles.

(Marked "Defendant's Exhibit V," of this date.)

Mr. COLEMAN. I also offer in evidence in connection with paragraph 19 of the stipulation, which refers to other companies doing business similar to the plaintiff as their principal business, descriptive matter of the business which they do carry on and the method in which it is carried on, and the documents they issue in connection with the mortgage loans.

16 The COURT. I will give the stipulation its widest scope, that they are doing exactly the same thing.

Motions for judgment

Mr. FORBES. I renew the motion originally made for judgment on the pleadings.

The COURT. Motion denied with exception.

Mr. FORBES. I also move for judgment on the evidence.

The COURT. I reserve decision.

Mr. COLEMAN. I move for judgment upon the pleadings and on the evidence produced at the trial, on the ground that the evidence shows clearly that the plaintiff is not engaged in insurance work and that the plaintiff is clearly taxable under sec. 1000 of the revenue act.

(Defendant's exhibits are marked as follows:
X1, pamphlet entitled "Specialists in Safety."
X2, X3, X4, blank forms.
X5, blank mortgage certificate.
X6, sample guarantee policy.)

17 In United States District Court

[Title omitted.]

Stipulation of facts and waiver of jury trial

Now come plaintiff and defendant in the above-entitled cause, by their respective attorneys, and thereupon it is agreed that the above case may be tried by the court without the intervention of a jury, trial by jury being hereby expressly waived, and it is further expressly agreed that the following facts shall be taken as true, and that the respective paragraphs of this stipulation may be introduced as evidence thereof by either party, subject, however, to the objections on the ground of immateriality and irrelevancy herein specifically stated, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence in the case.

It is requested by the parties hereto that the court, upon the decision of the said case, separately state its findings of fact and conclusions of law.

18 1. Plaintiff is a corporation duly incorporated as the Lawyers Mortgage Insurance Company on or about February 9, 1893, under Article V of the insurance law of the State of New York (Laws of 1892, chapter 690) pertaining to title and credit guaranty corporations, its charter or certificate of incorporation having been duly filed on said date in the office of the superintendent of insurance of the State of New York.

A true and correct copy of said charter or certificate of incorporation is attached hereto and made a part hereof as Exhibit A.

2. By order of the Supreme Court of the State of New York, entered October 3, 1903, the name of the company was duly changed to Lawyers Mortgage Company.

3. On or about January 10, 1905, the plaintiff duly amended the statement of its purposes as contained in its original certificate of incorporation, and filed in the office of the superintendent of insur-

ance of said State of New York as amended certificate, a copy of which is hereto attached and made a part hereof as Exhibit B.

4. On or about December 18, 1913, plaintiff's certificate of incorporation, with the consent of said superintendent of insurance, was further duly amended so as to include in the statement of the purposes and powers of the company all the powers which might be included in the certificate of incorporation of a title guaranty corporation organized under Article V, section 170, paragraph 1, of the insurance law, as amended by chapter 215 of the Laws of 1913.

19 A true and correct copy of said amended certificate of incorporation is hereto attached and made a part hereof as Exhibit C.

5. Plaintiff, since the date of its incorporation, has always been, and now is, subject to examination by, and supervision of, the superintendent of insurance of the State of New York and is, and has been, subject to all the provisions of the insurance law of the State of New York applicable to so-called title and credit guaranty corporations organized thereunder, and is, and has been, required to file, and has filed, annually with the said superintendent of insurance on forms approved by him statements of its condition as of December 31 of each year.

True and correct copies of plaintiff's annual statements for the calendar years ending December 31, 1921, and December 31, 1922, are attached hereto and made a part hereof as Exhibits D and E, respectively.

6. Plaintiff each year publishes for the information of its stockholders annual reports showing the condition of the company, its assets and liabilities, earnings and surplus, for the preceding year.

(Objected to by the plaintiff as immaterial and irrelevant.)

Attached hereto and made a part hereof are copies of plaintiff's annual reports for the calendar years 1921 and 1922, marked "Exhibits F and G," respectively.

(Same objection by plaintiff.)

20 7. A copy of plaintiff's by-laws, in effect during the calendar years 1921 and 1922, is attached and made a part hereof as Exhibit H.

(Objected to by the plaintiff as immaterial and irrelevant.)

8. On or about July 29, 1922, plaintiff voluntarily, but, as plaintiff now claims, erroneously filed with defendant a capital-stock tax return for the period from July 1, 1922, to June 30, 1923, inclusive, and on or about November 3, 1922, paid to the defendant $10,147, the amount of the alleged capital-stock tax shown on the said return.

A true and correct copy of the said return is hereto attached and made a part hereof as Exhibit I.

9. Thereafter, on or about November 14, 1923, plaintiff filed with the defendant a claim for the refund of the said sum of $10,147, which claim was thereafter duly rejected.

A true and correct copy of the said claim for refund is hereto attached and made a part hereof as Exhibit J.

10. On or about July 27, 1923, plaintiff voluntarily, but, as plaintiff now claims, erroneously filed with defendant a capital-stock tax return for the period from July 1, 1923, to June 30, 1924, inclusive, and on or about September 4, 1923, paid to the defendant $10,731, the amount of the alleged capital-stock tax shown on the said return.

A true and correct copy of the said return is hereto attached and made a part hereof as Exhibit K.

21 11. On or about November 14, 1923, plaintiff filed with defendant a claim for refund of the said sum of $10,731, which claim was thereafter duly rejected.

A true and correct copy of the said claim for refund is hereto attached and made a part hereof as Exhibit L.

12. On or about August 20, 1925, the said claims for refund (Exhibit J and Exhibit L) were denied by a letter dated August 20, 1925, a copy of which is hereto attached and made a part hereof as Exhibit M.

13. On or about March 15, 1922, plaintiff filed with defendant a consolidated income-tax return for itself and its subsidiary companies, the Nassau-Maiden Lane Loan Building Corporation, Liberty Brokerage Company, and Elemco Realty Company, Inc., for the calendar year 1921, including therein as taxable income its lending and extension fees, hereinafter explained in detail, as well as its other taxable income, and thereafter paid to the defendant the amount of the alleged income taxes shown thereon.

A true and correct copy of the said return is attached hereto and made a part hereof as Exhibit N.

14. On or about March 14, 1923, plaintiff filed with defendant a consolidated income-tax return for itself and its subsidiary companies above mentioned for the calendar year 1922, including therein as taxable income its lending and extension fees, hereinafter explained in detail, as well as its other taxable income, and

22 thereafter paid to the defendant the amount of the alleged income taxes shown thereon.

A true and correct copy of the said return is attached hereto and made a part hereof as Exhibit O.

15. On or about March 15, 1924, plaintiff filed with the defendant a consolidated income-tax return for itself and its subsidiary companies for the year 1923, including therein as taxable income its lending and extension fees, hereinafter explained in detail, as well as its other taxable income, and thereafter paid the amount of the alleged income taxes shown thereon.

A true and correct copy of the said return is attached hereto and made a part hereof as Exhibit P.

16. Plaintiff has never engaged in the business of insuring titles to real estate, nor has it ever issued policies of title insurance, although authorized by its charter so to do. The business of the plaintiff, and the manner of conducting it is, and was, at all the times material to this action, substantially as follows (it being under-

stood that wherever the word "insure," or any of its derivatives, is used with reference to the business of the plaintiff, the defendant denies that such word is properly used with reference thereto):

(a) Plaintiff receives applications for loans on real-estate security in New York City and vicinity. Where an application is for a loan on improved property, the plaintiff causes its appraisers to determine whether, in their opinion, the value of the property
23 is sufficient to justify the loan applied for. Where the application is for a loan on property on which a building is to be erected (commonly called a "building loan"), the plaintiff causes its appraisers to determine from an examination of the plans and specifications submitted and from an investigation of the financial responsibility of the applicant whether, in their opinion, the proposed loan is a desirable one for the plaintiff to make. If the report of the appraisers is favorable, the prospective borrower usually signs a formal contract for the loan upon one of the plaintiff's regular forms, a copy of which is attached hereto marked "Exhibit Q." If the loan is a building loan, the borrower subsequently signs a formal building loan contract on one of plaintiff's forms therefor, a copy of which is attached hereto marked "Exhibit R," setting forth the terms and conditions upon which the loan will be advanced to the borrower. A copy of the formal contract (Exhibit Q) is at once turned over to a title insurance company, which issues its report on the condition of the title and furnishes a survey, and, after the closing of the loan, delivers its policy of title insurance.

Upon closing a loan on improved property, the borrower executes a bond and first mortgage on the premises to the plaintiff in the customary form, a specimen of the printed form supplied by the plaintiff and frequently used being attached hereto and made a part hereof as Exhibit S, or causes an existing bond and mortgage to be duly assigned to the plaintiff; and the plaintiff pays to the bor-
24 rower the face amount of the principal of the loan, less the charges of the title insurance company for title insurance and survey, necessary disbursements for drawing and recording papers, and the mortgage recording tax (so far as such charges have not already been paid or taken care of by the borrower) and less a lending fee, at the prevailing rates, which includes its appraisal charges; and such lending fees constitute a part of the gross income of the plaintiff. In the case of a building loan, the borrower upon closing executes a bond and first mortgage to the plaintiff and the plaintiff makes advances to the borrower in accordance with the terms of the contract, the charges and lending fee being handled in the same way as in the case of a loan on improved property.

(b) The plaintiff receives from investors and others requests to purchase from plaintiff mortgage loans, or participations therein, the payment of which is to be insured or guaranteed by plaintiff in the manner hereinafter described, and also frequently invites, and specially during the years 1921–1924, inclusive, did invite, offers to pur-

chase said bonds and mortgages or participations therein. Where the plaintiff holds a mortgage loan satisfactory to the applicant, the procedure transferring the same to the applicant is in one of the following ways:

(1) The bond and mortgage is sold as a whole and assigned to a purchaser at its face value. As part of the transaction, the
25 company delivers to the purchaser its so-called policy of mortgage guaranty, a specimen copy of which is hereto attached and made a part hereof as Exhibit T. This instrument, Exhibit T, recites the name of the assignee; and in paragraph marked "First" thereof is inserted the rate of interest, which is ordinarily one-half of one per centum less than the rate of interest specified in the bond and mortgage itself. Such difference between the rate of interest specified in the bond and mortgage itself and the rate specified in Exhibit T (usually one-half of one per centum as aforesaid) is, when collected, retained by the plaintiff in accordance with the terms of Exhibit T. Such difference is designated a premium in the exhibits hereto attached and in business usage is called a premium; but the defendant denies that the term "premium," in its legal and its correct meaning, is applicable thereto and objects to its characterization as such herein upon the ground that evidence as to the term used is irrelevant and immaterial.

(2) The procedure in paragraph (1) above is followed where there is a complete assignment of the bond and mortgage to a single purchaser. The plaintiff also assigns to purchasers fractional interests or participations in bonds and mortgages, especially those for large amounts. For that purpose, the plaintiff issues to such holders its so-called "guaranteed first-mortgage certificate," a
26 specimen copy of which is attached hereto and made a part hereof as Exhibit U. For example, where the original bond and mortgage was for $100,000, with interest at six per cent per annum and the investor paid to the plaintiff $10,000 for a participation therein, Exhibit U would recite the receipt of $10,000, the assignment of an undivided interest to the extent of $10,000 in the bond and mortgage of $100,000 and the guarantee by the plaintiff of the payment to the holder of interest at the rate of five and one-half per cent per annum and of the principal in full. This difference (usually one-half of one per cent) between the rate of interest specified in the bond and mortgage and the rate of interest specified in the participation certificate is retained by the plaintiff, when collected, in accordance with the terms of Exhibit U. Such difference is designated a premium in the exhibits hereto attached and in business usage is called a premium; but the defendant denies that the term "premium," in its legal and its correct meaning, is applicable thereto and objects to its characterization as such herein upon the ground that evidence as to the term used is irrelevant and immaterial.

(c) Plaintiff also receives from owners of outstanding bonds and mortgages applications to insure or guarantee in the manner herein described the payment of such bonds and mortgages, as evidenced by its so-called policy, Exhibit T; and in some cases a lender,
27 about to make a mortgage loan, makes it a condition that the plaintiff shall guarantee the payment of the mortgage, in which case the application for the so-called policy is submitted by the prospective borrower. In both such cases the plaintiff, if it accepts such application, issues an instrument in the form of Exhibit T for the principal sum of the bond and mortgage, guaranteeing the payment of interest at one-half of one per centum less than the rate specified in the bond and mortgage itself. Such difference between the rate specified in the bond and mortgage itself and the rate specified in Exhibit T, is, when collected, retained by plaintiff in accordance with the terms of Exhibit T. Such difference is designated a premium in the exhibits hereto attached and in business usage is called a premium; but the defendant denies that the term "premium," in its legal and its correct meaning, is applicable thereto and objects to its characterization as such herein upon the ground that evidence as to the term used is irrelevant and immaterial. Before issuing its so-called policy, Exhibit T, the plaintiff causes the customary search and survey to be made, the expense of which is paid by the applicant for the loan. Its business done in this manner, while substantial in amount, constitutes only a small percentage of the total business of the plaintiff.

(d) In occasional cases there are investors who desire to take mortgage loans, or participations therein, before such loans are closed. In such cases such investors pay to the plaintiff in
28 advance the amount which they wish to invest; and the plaintiff upon closing the desired loan and making the actual advance to the borrower, assigns the bond and mortgage to the investor and delivers to him its so-called policy, Exhibit T, or delivers its guaranteed mortgage certificate, Exhibit U, such transactions being in all other respects similar in detail to those above described.

17. The primary purpose of the plaintiff in making loans on bonds and mortgages is not for investment, but for the ultimate sale of the bonds and mortgages, either by way of complete assignments of bond and mortgage or by way of its guaranteed mortgage certificates, the proceeds from such sales being returned into the general funds of the plaintiff, from which investments and reinvestments in similar transactions are made in the ordinary course of plaintiff's business. In assigning a bond and mortgage the plaintiff always enters into the agreement evidence by Exhibit T, and the assignment of fractional interests is always evidenced by Exhibit U. In neither case does the plaintiff make any profit by selling a bond and mortgage, or a fractional interest therein, at more than its face value or more than the amount advanced by the plaintiff thereon, including therein the charges and fees above described.

18. As stated above, the plaintiff in making mortgage loans customarily charges the borrower a fee for its services, known as a lending fee. If, when the mortgage falls due, the borrower desires to extend the time of payment, and the plaintiff is willing to grant such extension, the plaintiff customarily charges the borrower an extension fee, which includes its appraisal service. Such extension fees constitute a part of the gross income of the plaintiff.

Such original loans, and such extensions, are usually for a term of five years, though in the case of small loans the term is frequently three years.

Such lending fees and extension fees charged by the plaintiff are at the prevailing rates charged by lenders, whether individuals, partnerships, or corporations under whatever law of the State of New York incorporated, for mortgage loans and extensions in the city of New York, where the plaintiff's business is conducted, the rates for building loans being higher than for loans on improved property, since the lender must examine plans and must keep in constant touch with the building operations in order to see that the plans are complied with and to determine when the advances become due.

The plaintiff's lending, extension fees, so-called premiums, and interest earned on bonds and mortgages held by the plaintiff (computed on the accrual basis) were for the years 1922, 1923, and 1924, respectively, as follows:

	Lending fees	Extension fees	Premiums	Interest
Year 1922	$655, 283. 70	$214, 303. 56	$619, 986. 38	$372, 796. 12
Year 1923	990, 855. 37	73, 745. 71	750, 803. 21	426, 842. 31
Year 1924				

19. All other corporations incorporated under the provisions of article V of the insurance law of the State of New York which engage in guaranteeing mortgages follow the same general method of doing business as the plaintiff, with the exception of corporations affiliated with some title or trust company which do business only with such affiliated companies and not with the general public. At least two corporations incorporated under the banking law of the State of New York make mortgage loans and sell bonds and mortgages and participations therein, with their guaranty, in New York City as their principal business, under the same general method of doing business as the plaintiff, making such reports to the State banking department as are required by the provisions of the banking law.

20. Plaintiff from time to time issues advertising matter in connection with its business; and among such advertising matter issued by plaintiff are Exhibits——

(Objected to by the plaintiff as immaterial and irrelevant, the same objection applying also to each exhibit, respectively.)

21. In the collection of stamp taxes under Title XI of the revenue act of 1918, the Treasury Department ruled that the tax imposed under Schedule A thereof on indemnity and surety bonds, "and on all policies of guaranty and fidelity insurance, including policies guaranteeing titles to real estate and mortgage guarantee policies," should be computed, in the case of instruments issued in the form of Exhibit T and Exhibit U, at the rate of one cent on each dollar or fractional part of the aggregate so-called premiums receivable thereunder, whether then or subsequently collected or not; and the plaintiff and other companies engaged in similar business duly
31 paid such stamp taxes on that basis in accordance with such rule. The plaintiff paid such stamp taxes without protest and has never filed any claim for the refund thereof.

(Objected to by the defendant as immaterial and irrelevant.)

22. Commencing with the year 1921 there has been a marked increase in building activity in New York City and a corresponding increase in the demand for mortgage loans, especially building loans.

23. Since April, 1922, the plaintiff has owned and occupied a building at No. 56 Nassau Street, New York, N. Y., as its principal office, in which there are stores for rent. Plaintiff has received rentals from such stores and at times has received rentals for surplus space in some of its branch offices. Apart from such rentals and other incidental amounts, the plaintiff's income consists of the income from its investments, its extension and lending fees, and the so-called premium described above. All the plaintiff's income and its expenses and other information regarding its business are set forth in its annual reports to the superintendent of insurance of the State of New York. It is agreed that the court may take judicial notice of the published annual reports of the said superintendent.

24. At none of the times material to this action were the plaintiff's assets segregated or earmarked in any way for investment purposes or otherwise, all of its assets and all of its capital, surplus and undivided profits being employed indiscriminately in its business activi-
ties, except that the plaintiff has always maintained a guaranty
32 fund pursuant to the supposed requirements of Article V of the New York insurance law. That law required corporations organized thereunder to maintain a certain guaranty fund in specified classes of investments. All of the bonds and mortgages obtained by the plaintiff in the manner hereinbefore described were legal investments for such fund; and plaintiff's investments of the classes required for said fund always exceeded the amount required by the statute. But no investments were segregated or earmarked by the

plaintiff as being a part of a guaranty fund, the plaintiff always having on hand a sufficient amount of such investments to satisfy said requirements.

New York, January 17, 1929.

SHEARMAN & STERLING,
Attorneys for Plaintiff.
CHARLES H. TUTTLE,
United States Attorney,
Attorney for Defendant,
By S. C. COLEMAN,
Assistant U. S. Attorney.

33 In United States District Court, Southern District of New York

L. 36/348

LAWYERS MORTGAGE COMPANY

against

FRANK K. BOWERS, COLLECTOR OF INTERNAL REVENUE

Action at law to recover capital stock taxes paid for two fiscal years beginning July 1, 1922. Trial without a jury upon a stipulation of facts.

Messrs. Shearman & Sterling (Harry W. Forbes, of counsel) attorneys for plaintiff; Charles H. Tuttle, Esq., U. S. attorney (Samuel C. Coleman, assistant U. S. attorney, of counsel), for the collector.

Memorandum opinion

COLEMAN, D. J.:

The only question presented is whether plaintiff was an "insurance company" within the meaning of the revenue act of 1921, section 1000. It voluntarily paid a capital stock tax for each of the fiscal years in question, and now seeks a refund on the ground that it was an "insurance company" and therefore expressly exempt under the statute in force at the time. Concededly it did some pure in-

34 surance business, and a large amount that was not insurance.

The statute does not define an "insurance company," and the question is whether the nature of plaintiff's business and its status under the state laws put it in that class.

Plaintiff was incorporated in 1893, under the insurance law of New York, with the title Lawyers Mortgage Insurance Company, which was later changed to Lawyers Mortgage Company without, apparently, any change in the nature of its business. It has ever since been subject to the insurance department of the State, comply-

ing with the latter's requirements in reference to reports, investments, etc. Most of the business which plaintiff has been doing would have been perfectly lawful if the company had been incorporated under the banking law of New York and subject to that department rather than the insurance department; but a small part, being pure insurance business, would have been unlawful.

The business principally consists of lending money on bonds and mortgages and then selling them (or participation in them), together with so-called policies of mortgage guaranty. The bonds and mortgages which plaintiff receives on its loans it sells at their face amount, either outright or through participation certificates. It thus makes no direct profit on the sales, but each purchaser is required to appoint the plaintiff his attorney in fact to collect the interest and principal, and to agree that plaintiff may retain a certain part of the interest collected in payment of the "premium" for the "policy" of mortgage guaranty.

There are only two sources of substantial profit to the plaintiff in the business above outlined; (1) In making the loans plain-
35 tiff charges the borrower a lending fee; and (2) in selling the mortgages or participation certificates plaintiff receives a "premium" on its "policies" guaranty. The lending fee covers the cost of an appraisal of the property in which the loan is made, but includes also a profit. Of course, plaintiff also receives *in-* interest on the bonds and mortgages before they are sold to investors, but they are sold as quickly as possible except for the amount of the guaranty fund required by the insurance law.

In the course of the transactions above outlined, which constitute the bulk of plaintiff's business, the only part that has any of the features of insurance is the guaranty given when the bonds and mortages are sold, and defendant contends that even this is not insurance. The guaranty is embodied in a separate document entitled "policy of mortgage guaranty" and in the community generally is known as "policy." The consideration for it is expressed in the policy and is known in the community as a "premium," being the portion of the interest on the bond and mortgage retained by the plaintiff. The guaranty is of payment of both principal and interest.

All of that business, including the guaranty, could be done by a corporation organized under the banking law of New York and subject only to that department and not the insurance department. In fact there are two corporations so organized doing substantially the same kind of business, though there are many more under the insurance law.

Defendant urges that the giving of the guaranty is not insurance,
because plaintiff as the owner of the bond and mortgage
36 merely adds the guaranty as an incident of the sale. It should be noted, however, that there is a specific consideration paid by the purchaser for the guaranty, and the latter is embodied in

the form of a policy. The relations of the parties when the guaranty becomes effective are exactly the same as though plaintiff had never owned the bond and mortgage, and defendant concedes that in the latter case the giving of it would be an act of insurance. Plaintiff's ownership of the bonds and mortgages has an important bearing on the question whether it is an "insurance company" or merely an investment company that does some insurance; but I do not see how it prevents the guaranty from being insurance if it would otherwise be so, as defendant concedes.

In addition to the above business, plaintiff does a small amount of what defendant concedes to be insurance, in that it guarantees mortages which it has never owned and embodies the guaranty in policies for which stipulated fees are paid. This portion of the business would be unlawful if plaintiff were incorporated under any other than the insurance law.

Assuming that the insurance of all of plaintiff's policies is insurance business, the more difficult question remains whether it is an "insurance company" or merely a company that does some insurance. The proportion which its insurance business bore to the rest may be seen from the gross income for two years as follows:

	Lending fees (including extension fees)	Premiums	Interest
Year 1922	$869,587.36	$619,986.38	$372,795.12
Year 1923	106,460.09	750,805.21	426,841.31

37. It thus appears that a very substantial part of plaintiff's business is insurance, and a small part of it could not be done if the plaintiff were not organized under the insurance law. I do not think it can be said that either the insurance business or the noninsurance business is incidental to the other. Both are sources of substantial income and are direct objectives coordinate in plaintiff's plan.

In the past both the plaintiff and the Government have taken positions inconsistent with their present contentions, but I do not think that throws much light on the question to be decided. Furthermore, I do not see much significance in the fact that plaintiff advertised the noninsurance part of its business in a way that gave no indication that it was an insurance company.

In this situation of doubt, where from the nature of its business it might be classed either as an insurance company or otherwise, I think its status under the New York laws is determinative. Certainly the State authorities recognize it as an insurance company. It was so incorporated and has always been so treated by the insurance department. In a somewhat similar case, United States v. Cam-

bridge Loan & Building Co., the Supreme Court held that the State law was controlling.

To disregard its status under the laws of New York and to consider only the nature of the business done would give rise to great uncertainty and variation in its classification. A corporation could not be disqualified from being classed as an insurance company merely because it did some other business, whether incidental or independent. But what proportion between the two kinds
38 of business would be fixed as determinative? Furthermore, a company might with only slight fluctuations in the various departments of its business vary from year to year in its classification. The whole scheme of the Federal taxation is inconsistent with that situation.

I therefore direct judgment for the plaintiff. The findings will, of course, be the same as the stipulation of facts.

Dated August 2, 1929.

FRANK J. COLEMAN,
U. S. District Judge.

39 In United States District Court

[Title omitted.]

Plaintiff's findings of fact and conclusions of law

The issues of fact having duly come on to be tried by the court at a civil jury term of this court, held by the undersigned without a jury on January 29, 1929, and the allegations and proofs of the parties having been fully heard,

Now upon hearing Harry W. Forbes, of counsel for the plaintiff, and Samuel C. Coleman, assistant U. S. attorney, of counsel for the defendant, and due deliberation having been had, I decide and find as follows:

FINDINGS OF FACT

1. Plaintiff is a corporation duly incorporated as the Lawyers Mortgage Insurance Company on or about February 9, 1893, under Article V of the insurance law of the State of New York
40 (Laws of 1893, chapter 690) pertaining to title and credit guaranty corporations, its charter or certificate of incorporation having been duly filed on said date in the office of the superintendent of insurance of the State of New York.

A true and correct copy of said charter or certificate of incorporation is attached to the stipulation of facts herein as Exhibit A.

2. By an order of the Supreme Court of the State of New York, entered October 3, 1903, the name of the plaintiff was duly changed to Lawyers Mortgage Company.

3. On or about January 10, 1905, the plaintiff duly amended the statement of its purposes as contained in its original certificate of incorporation, and filed in the office of the superintendent of insur-

ance of said State of New York an amended certificate, a copy of which is attached to the stipulation of facts herein as Exhibit B.

4. On or about December 18, 1913, plaintiff's certificate of incorporation with the consent of said superintendent of insurance was further duly amended so as to include in the statement of the purposes and powers of the company all the powers which might be included in the certificate of incorporation of a title guaranty corporation organized under Article V, section 170, paragraph 1, of the insurance law, as amended by chapter 215 of the Laws of 1913.

A true and correct copy of said amended certificate of incorporation is attached to the stipulation of facts herein as Exhibit C.

41 5. Plaintiff since the date of its incorporation has always been, and now is, subject to examination by, and supervision of, the superintendent of insurance of the State of New York and is, and has been, subject to all the provisions of the insurance law of the State of New York applicable to so-called title and credit guaranty corporations organized thereunder, and is, and has been, required to file, and has filed, annually with the said superintendent of insurance on forms approved by him statements of its condition as of December 31 of each year.

True and correct copies of plaintiff's annual statements for the calendar years ending December 31, 1921, and December 31, 1922, are attached to the stipulation of facts herein as Exhibits D and E, respectively.

6. Plaintiff each year publishes for the information of its stockholders annual reports showing the condition of the company, its assets and liabilities, earnings and surplus, for the preceding year, including the annual reports for the calendar year of 1921 and 1922.

Copies of plaintiff's annual reports for the calendar years 1921 and 1922 are attached to the stipulation of facts herein as Exhibits F and G, respectively.

7. A copy of plantiff's by-laws, in effect during the calendar years 1921 and 1922, is attached to the stipulation of facts herein as Exhibit H.

8. On or about July 29, 1922, plaintiff voluntarily, but, as
41 plaintiff now claims, erroneously filed with defendant a capital-stock tax return for the period from July 1, 1922, to June 30, 1923, inclusive, and on or about November 3, 1922, paid to the defendant $10,147, the amount of the alleged capital-stock tax shown on the said return.

A true and correct copy of the said return is attached to the stipulation of facts herein as Exhibit I.

9. Thereafter, on or about November 14, 1923, plaintiff filed with the defendant a claim for a refund of the said sum of $10,147, which claim was thereafter duly rejected.

A true and correct copy of the said claim for refund is attached to the stipulation of facts herein as Exhibit J.

10. On or about July 27, 1923, plaintiff voluntarily, but, as plaintiff now claims, erroneously filed with defendant a capital-stock tax return for the period from July 1, 1923, to June 30, 1924, inclusive, and on or about September 4, 1923, paid to the defendant $10,731, the amount of the alleged capital-stock tax shown on the said return.

A true and correct copy of the said return is attached to the stipulation of facts herein as Exhibit K.

11. On or about November 14, 1923, plaintiff filed with the defendant a claim for refund of the said sum of $10,731, which claim was thereafter duly rejected.

A true and correct copy of the said claim for refund is attached to the stipulation of facts herein as Exhibit L.

43 12. On or about August 20, 1925, the said claims for refund (Exhibit J and Exhibit L) were denied by a letter dated August 20, 1925, a copy of which is attached to the stipulation of facts herein as Exhibit M.

13. On or about March 15, 1922, plaintiff filed with the defendant a consolidated income-tax return for itself and its subsidiary companies, the Nassau-Maiden Lane Loan Building Corporation, Liberty Brokerage Company, and Elemco Realty Company, Inc., for the calendar year 1921, including therein as taxable income its lending and extension fees, as well as its other taxable income, and thereafter paid to the defendant the amount of the alleged income taxes shown thereon.

A true and correct copy of the said return is attached to the stipulation of facts herein as Exhibit N.

14. On or about March 14, 1923, plaintiff filed with defendant a consolidated income-tax return for itself and its subsidiary companies, the Nassau-Maiden Lane Loan Building Corporation, Liberty Brokerage Company, and Elemco Realty Company, Inc., for the calendar year 1922, including therein as taxable income its lending and extension fees, as well as its other taxable income, and thereafter paid to the defendant the amount of the alleged income taxes shown thereon.

A true and correct copy of the said return is attached to the stipulation of facts herein as Exhibit O.

44 15. On or about March 15, 1924, plaintiff filed with the defendant a consolidated income-tax return for itself and its subsidiary companies, the Nassau-Maiden Lane Loan Building Corporation, Liberty Brokerage Company, and Elemco Realty Company, Inc., for the year 1923, including therein as taxable income its lending and extension fees, as well as its other taxable income, and thereafter paid the amount of the alleged income taxes shown thereon.

A true and correct copy of the said return is attached to the stipulation of facts herein as Exhibit P.

16. Plaintiff has never engaged in the business of insuring titles to real estate, nor has it ever issued policies of title insurance, although authorized by its charter so to do. The business of the

plaintiff, and the manner of conducting it, is, and was, at all the times material to this action, substantially as follows:

(a) Plaintiff receives applications for loans on real-estate security in New York City and vicinity. Where an application is for a loan on improved property, the plaintiff causes its appraisers to determine whether, in their opinion, the value of the property is sufficient to justify the loan applied for. Where the application is for a loan on property on which a building is to be erected (commonly called a "building loan"), the plaintiff causes its appraisers to determine from an examination of the plans and specifications submitted
45 and from an investigation of the financial responsibility of the applicant whether, in their opinion, the proposed loan is a desirable one for the plaintiff to make. If the report of the appraisers is favorable, the prospective borrower usually signs a formal contract for the loan upon one of the plaintiff's regular forms, a copy of which is attached to the stipulation of facts herein as Exhibit Q. If the loan is a building loan, the borrower subsequently signs a formal building loan contract on one of the plaintiff's forms therefor, a copy of which is attached to the stipulation of facts herein as Exhibit R, setting forth the terms and conditions upon which the loan will be advanced to the borrower. A copy of the formal contract (Exhibit Q) is at once turned over to a title insurance company, which issues its report on the condition of the title and furnishes a survey, and after the closing of the loan, delivers its policy of title insurance.

Upon closing a loan on improved property, the borrower executes a bond and first mortgage on the premises to the plaintiff in the customary form, a specimen of the printed form supplied by the plaintiff and frequently used being attached to the stipulation of facts herein as Exhibit S, or causes an existing bond and mortgage to be duly assigned to the plaintiff; and the plaintiff pays to the borrower the face amount of the principal of the loan, less the charges of the title insurance company for title insurance and survey, necessary disbursements for drawing and recording
46 papers, and the mortgage recording tax (so far as such charges have not already been paid or taken care of by the borrower) and less a lending fee, at the prevailing rates, which includes its appraisal charges; and such lending fees constitute a part of the gross income of the plaintiff. In the case of a building loan, the borrower upon closing executes a bond and first mortgage to the plaintiff and the plaintiff makes advances to the borrower and lending fee being handled in the same way as in the case of loan on improved property."

(b) The plaintiff receives from investors and other requests to purchase from plaintiff mortgage loans, or participations therein, the payment of which is to be insured or guaranteed by plaintiff in the manner hereinafter described, and also frequently invites, and especially during the years 1921–24, inclusive, did invite, offers

to purchase said bonds and mortgages or participations therein. Where the plaintiff holds a mortgage loan satisfactory to the applicant, the procedure transferring the same to the applicant is in one of the following ways:

(1) The bond and mortgage is sold as a whole and assigned to a purchaser at its face value. As part of the transaction the company delivers to the purchaser its so-called policy of mortgage guaranty, a specimen copy of which is attached to the stipulation of facts herein as Exhibit T. This instrument, Exhibit T, recites
47 the name of the assignee; and in paragraph marked "First" thereof is inserted the rate of interest, which is ordinarily one-half of one per centum less than the rate of interest specified in the bond and mortgage itself and the rate specified in Exhibit T (usually one-half of 1 per centum as aforesaid) is, when collected, retained by the plaintiff in accordance with the terms of Exhibit T. Such difference is designated a premium in the exhibits attached to the stipulation of facts herein and in business usage is called a premium.

(2) The procedure in paragraph (1) above is followed where there is a complete assignment of the bond and mortgage to a single purchaser. The plaintiff also assigns to purchasers fractional interests or participations in bonds and mortgages, especially those for large amounts. For that purpose the plaintiff issues to such holders its so-called "guaranteed first-mortgage certificate," a specimen copy of which is attached to the stipulation of facts herein as Exhibit U. For example, where the original bond and mortgage was for $100,000, with interest at six per cent per annum, and the investor paid to the plaintiff $10,000 for a participation therein, Exhibit U would recite the receipt of $10,000, the assignment of an undivided interest to the extent of $10,000 in the bond and mortgage of $100,000, and the guarantee by the plaintiff of
48 the payment of the holder of interest at the rate of five and one-half per cent per annum and of the principal in full. This difference (usually one-half of one per cent) between the rate of interest specified in the bond and mortgage and the rate of interest specified in the participation certificate is retained by the plaintiff, when collected, in accordance with the terms of Exhibit U. Such difference is designated a premium in the exhibits attached to the stipulation of facts herein and in business usage is called a premium.

(c) Plaintiff also receives from owners of outstanding bonds and mortgages applications to insure or guarantee in the manner herein described the payment of such bonds and mortgages, as evidenced by its so-called policy, Exhibit T; and in some cases a lender, about to make a mortgage loan, makes it a condition that the plaintiff shall guarantee the payment of the mortgage in which case the application for the so-called policy is submitted by the prospective borrower. In both such cases the plaintiff, if it accepts such applica-

tion, issues an instrument in the form of Exhibit T for the principal sum of the bond and mortgage, guaranteeing the payment of interest at one-half of one per centum less than the rate specified in the bond and mortgage itself. Such difference between the rate specified in the bond and mortgage itself and the rate specified in Exhibit
49 T is, when collected, retained by plaintiff in accordance with the terms of Exhibit T. Such difference is designated a premium in the exhibits hereto attached and in business usage is called a premium. Before issuing its so-called policy, Exhibit T, the plaintiff causes the customary search and survey to be made, the expense of which is paid by the applicant for the loan. Its business done in this manner, while stubstantial in amount, constitutes only a small percentage of the total business of the plaintiff.

(d) In occasional cases there are investors who desire to take mortgage loans, or participations therein, before such loans are closed. In such cases such investors pay to the plaintiff in advance the amount they wish to invest; and the plaintiff upon closing the desired loan, and making the actual advance to the borrower, assigns the bond and mortgage to the investor and delivers to him its so-called policy, Exhibit T, or delivers its guaranteed mortgage certificates, Exhibit U, such transactions being in all other respects similar in detail to those above described.

17. The primary purpose of the plaintiff in making loans on bonds and mortgages is not for investment but for the ultimate sales of the bonds and mortgages, either by way of complete assignments of bond and mortgage or by way of its guaranteed mortgage certificates, the proceeds from such sales being returned into the general funds of the plaintiff, from which investments and
50 reinvestments in similar transactions are made in the ordinary course of plaintiff's business. In assigning a bond and mortgage, the plaintiff always enters into the agreement evidenced by Exhibit T; and the assignment of fractional interest is always evidenced by Exhibit U. In neither case does the plaintiff make any profit by selling a bond and mortgage, or a fractional interest therein, at more than its face value or more than the amount advanced by the plaintiff thereon, including therein the charges and fees above described.

18. As stated above, the plaintiff in making mortgage loans customarily charges the borrower a fee for its services, known as a lending fee. If, when the mortgage falls due, the borrower desires to extend the time of payment, and the plaintiff is willing to grant such extension, the plaintiff customarily charges the borrower an extension fee, which includes its appraisal services. Such extension fees constitute a part of the gross income of the plaintiff.

Such original loans, and such extensions, are usually for a term of five years, though in the case of small loans the term is frequently three years.

Such lending fees and extension fees charged by the plaintiff are at the prevailing rates charged by lenders, whether individuals, partnerships, or corporations under whatever law of the State of New York incorporated, for mortgage loans and extensions in the city of New York, where the plaintiff's business is conducted, the rates for building loans being higher than for loans on improved property, since the lender must examine plans and must keep in
51 constant touch with the building operations in order to see that the plans are complied with and to determine when the advances become due.

The plaintiff's lending, extension fees, so-called premiums, and interest earned on bonds and mortgages held by the plaintiff (computed on the accrual basis) were for the years 1922, 1923, and 1924, respectively, as follows:

	Landing fees	Extension fees	Premiums	Interest
Year 1922	$655, 283. 70	$214, 303. 56	$619, 986. 38	$372, 795. 12
Year 1923	990, 855. 37	73, 745. 71	750, 803. 21	426, 842. 31
Year 1924				

19. All other corporations incorporated under the provisions of Article V of the insurance law of the State of New York which engage in guaranteeing mortgages follow the same general method of doing business as the plaintiff, with the exception of corporations affiliated with some title or trust company which do business only with such affiliated companies and not with the general public. At least two corporations incorporated under the banking law of the State of New York make mortgage loans and sell bonds and mortgages and participations therein, with their guaranty, in New York City, as their principal business, under the same general method of doing business as the plaintiff, making such reports to the State banking department as are required by the provisions of the banking law.

20. Plaintiff from time to time issues advertising matter in
52 connection with its business, and among such advertising matter issued by plaintiff were the extracts shown in Exhibit V, referred to in the stipulation of facts herein.

21. In the collection of stamp taxes under Title XI of the revenue act of 1918 the Treasury Department ruled that the tax imposed under Schedule A thereof on indemnity and surety bonds, "and on all policies of guaranty and fidelity insurance, including policies guaranteeing titles to real estate and mortgage guarantee policies," should be computed, in the case of instruments issued in the form of Exhibit T and Exhibit U, at the rate of one cent on each dollar or fractional part of the aggregate so-called premiums receivable thereunder, whether then or subsequently collected or not; and the plaintiff and other companies engaged in similar business duly paid such stamp taxes on that basis in accordance with such rule. The plain-

tiff paid such stamp taxes without protest and has never filed any claim for the refund thereof.

22. Commencing with the year 1921, there has been a marked increase in building activity in New York City and a corresponding increase in the demand for mortgage loans, especially building loans.

23. Since April, 1922, the plaintiff has owned and occupied a building at No. 56 Nassau Street, New York, N. Y., as its principal office, in which there are stores for rent. Plaintiff has received
53 rentals from such stores and at times has received rentals for surplus space in some of its branch offices. Apart from such rentals and other incidental amounts, the plaintiff's income consists of the income from its investments, its extension and lending fees, and the so-called premiums described above. All the plaintiff's income and its expenses and other information regarding its business are set forth in its annual reports to the superintendent of insurance of the State of New York. It is agreed that the court may take judicial notice of the published annual reports of the said superintendent.

24. At none of the times material to this action were the plaintiff's assets segregated or earmarked in any way for investment purposes or otherwise, all of its assets and all of its capital, surplus, and undivided profits being employed indiscriminately in its business activities, except that the plaintiff has always maintained a guaranty fund pursuant to the supposed requirements of Article V of the New York insurance law. That law required corporations organized thereunder to maintain a certain guaranty fund in specified classes of investments. All of the bonds and mortgages obtained by the plaintiff in the manner hereinbefore described were legal investments for such fund; and plaintiff's investments of the classes required for said fund always exceeded the amount required by the statute. But no investments were segregated or earmarked by the plaintiff as being a part of a guaranty fund, the plaintiff always having on hand a sufficient amount of such investments to satisfy said requirements.

54 CONCLUSIONS OF LAW

1. At all the times material to this action the plaintiff was an insurance company, within the meaning of sections 246, 247, and 1000 of the revenue act of 1921, and accordingly was not subject to the capital-stock tax imposed by section 1000 of the said act.

2. The plaintiff is entitled to recover from the defendant the said sums of $10,147, paid by it to the defendant on July 29, 1922, and $10,731, paid by it to the defendant on August 31, 1923, with interest.

I accordingly direct judgment for the plaintiff, Lawyers Mortgage Company, against the defendant, Frank K. Bowers, collector of internal revenue, for the sum of $20,878, with interest on the sum of

$10,147 from July 29, 1922, and with interest on the sum of $10,781 from August 31, 1923, together with the costs and disbursements of this action, which are hereby awarded to the plaintiff, the same to be taxed.

FRANK J. COLEMAN, *U. S. D. J.*

In United States District Court

[Title omitted.]

55 *Defendant's findings of fact and conclusions of law*

The issues of fact having duly come on to be tried by the court at a term held for the trial of civil causes of law before the undersigned without a jury on January 29, 1929, counsel for both parties by stipulation having waived a trial by jury, and the allegations and proofs of the parties having fully been heard,

Now upon hearing Harry W. Forbes, of counsel for the plaintiff, and Samuel C. Coleman, assistant United States attorney, of counsel for the defendant, and due deliberation having been had, I decide and find as follows:

FINDINGS OF FACT

1. Plaintiff is a corporation duly incorporated as the Lawyers Mortgage Insurance Company on or about February 9, 1893,
56 under Article V of the insurance law of the State of New York (Laws of 1893, chapter 690) pertaining to title and credit guaranty corporations, its charter or certificate of incorporation having been duly filed on said date in the office of the superintendent of insurance of the State of New York.

A true and correct copy of said charter or certificate of incorporation is attached to the stipulation of facts herein as Exhibit A.

2. By an order of the Supreme Court of the State of New York, entered October 3, 1903, the name of the plaintiff was duly changed to Lawyers Mortgage Company.

3. On or about January 10, 1905, the plaintiff duly amended the statement of its purposes as contained in its original certificate of incorporation, and filed in the office of the superintendent of insurance of said State of New York as amended certificate, a copy of which is attached to the stipulation of facts herein as Exhibit B.

4. On or about December 18, 1913, plaintiff's certificate of incorporation with the consent of said superintendent of insurance was further duly amended so as to include in the statement of the purposes and powers of the company all the powers which might be included in the certificate of incorporation of a title guaranty corporation organized under Article V, section 170, paragraph 1, of the insurance law, as amended by chapter 215 of the Laws of 1913.

A true and correct copy of said amended certificate of incorporation is attached to the stipulation of facts herein as Exhibit C.

57 5. Plaintiff since the date of its incorporation has always been, and now is, subject to examination by, and supervision of, the superintendent of insurance of the State of New York and is, and has been, subject to all the provisions of the insurance law of the State of New York applicable to so-called title and credit-guaranty corporations organized thereunder and is, and has been, required to file, and has filed, annually with the said superintendent of insurance on forms approved by him statements of its condition as of December 31 of each year.

True and correct copies of plaintiff's annual statements for the calendar years ending December 31, 1921, and for December 31, 1922, are attached to the stipulation of facts herein as Exhibits D and E, respectively.

6. Plaintiff each year publishes for the information of its stockholders annual reports showing the condition of the company, its assets and liabilities, earnings and surplus, for the preceding year, including the annual reports for the calendar year of 1921 and 1922.

Copies of plaintiff's annual reports for the calendar years 1921 and 1922 are attached to the stipulation of facts herein as Exhibits F and G, respectively.

7. A copy of plaintiff's by-laws, in effect during the calendar years 1921 and 1922, is attached to the stipulation of facts herein as Exhibit H.

58 8. On or about July 29, 1922, plaintiff voluntarily but, as plaintiff now claims, erroneously filed with defendant a capital-stock tax return for the period from July 1, 1922, to June 30, 1923, inclusive, and on or about November 3, 1922, paid to the defendant $10,147, the amount of the alleged capital-stock tax shown on the said return.

A true and correct copy of the said return is attached to the stipulation of facts herein as Exhibit I.

9. Thereafter, on or about November 14, 1923, plaintiff filed with the defendant a claim for the refund of the said sum of $10,147, which claim was thereafter duly rejected.

A true and correct copy of the said claim for refund is attached to the stipulation of facts herein as Exhibit J.

10. On or about July 27, 1923, plaintiff voluntarily, but as plaintiff now claims, erroneously filed with defendant a capital-stock tax return for the period from July 1, 1923, to June 30, 1924, inclusive, and on or about September 4, 1923, paid to the defendant $10,731, the amount of the alleged capital-stock tax shown on the said return.

A true and correct copy of the said return is attached to the stipulation of facts herein as Exhibit K.

11. On or about November 14, 1923, plaintiff filed with the defendant a claim for refund of the said sum of $10,731, which claim was thereafter duly rejected.

A true and correct copy of the said claim for refund is attached to the stipulation of facts herein as Exhibit L.

59 12. On or about August 20, 1925, the said claim for refund (Exhibit J and Exhibit L) were denied by a letter dated August 20, 1925, a copy of which is attached to the stipulation of facts herein as Exhibit M.

13. On or about March 15, 1922, plaintiff filed with the defendant a consolidatd income-tax return for itself and its subsidiary companies, the Nassau-Maiden Lane Loan Building Corporation, Liberty Brokerage Company, and Elemco Realty Company, Inc., for the calendar year 1921, including therein as taxable income its lending and extension fees, as well as its other taxable income, and thereafter paid to the defendant the amount of the alleged income taxes shown thereon.

A true and correct copy of the said return is attached to the stipulation of facts herein as Exhibit N.

14. On or about March 14, 1923, plaintiff filed with defendant a consolidated income-tax return for itself and its subsidiary companies, the Nassau-Maiden Lane Loan Building Corporation, Liberty Brokerage Company, and Elemco Realty Company, Inc., for the calendar year 1922, including therein as taxable income its lending and extension fees, as well as its other taxable income, and thereafter paid to the defendant the amount of the alleged income taxes shown thereon.

A true and correct copy of the said return is attached to the stipulation of facts herein as Exhibit O.

15. On or about March 15, 1924, plaintiff filed with the
60 defendant a consolidated income-tax return for itself and its subsidiary companies, the Nassau-Maiden Lane Loan Building Corporation, Liberty Brokerage Company, and Elemco Realty Company, Inc., for the year 1923, including therein as taxable income its lending and extension fees, as well as its other taxable income, and thereafter paid the amount of the alleged income taxes shown thereon.

A true and correct copy of the said return is attached to the stipulation of facts herein as Exhibit P.

16. Plaintiff has never engaged in the business of insuring titles to real estate, nor has it ever issued policies of title insurance, although authorized by its charter so to do. The business of the plaintiff, and the manner of conducting it is, and was, at all the times material to this action, substantially as follows:

(a) Plaintiff receives applications for loans on real-estate security in New York City and vicinity. Where an application is for a loan on improved property, the plaintiff causes its appraisers to determine whether, in their opinion, the value of the property is sufficient to justify the loan applied for. Where the application is for a loan on property on which a building is to be erected, (commonly called a "building loan"), the plaintiff causes its appraisers to determine from an examination of the plans and specifications submitted and from an investigation of the financial

responsibility of the applicant whether, in their opinion, the
61 proposed loan is a desirable one for the plaintiff to make.
If the report of the appraisers is favorable the prospective
borrower usually signs a formal contract for the loan upon one of
the plaintiff's regular forms, a copy of which is attached to the
stipulation of facts herein as Exhibit Q. If the loan is a building
loan, the borrower subsequently signs a formal building loan con-
tract on one of the plaintiff's forms therefor, a copy of which is
attached to the stipulation of facts herein as Exhibit R, setting forth
the terms and conditions upon which the loan will be advanced to the
borrower. A copy of the formal contract (Exhibit Q) is at once
turned over to a title insurance company, which issues its report on
the condition of the title and furnishes a survey, and after the closing
of the loan, delivers its policy of title insurance.

Upon closing a loan on improved property, the borrower executes
a bond and first mortgage on the premises to the plaintiff in the
customary form, a specimen of the printed form, supplied by the
plaintiff and frequently used being attached to the stipulation of
facts herein as Exhibit S, or causes an existing bond and mortgage
to be duly assigned to the plaintiff; and the plaintiff pays to the
borrower the face amount of the principal of the loan, less the
charges of the title insurance company for title insurance and sur-
vey, necessary disbursements for drawing and recording papers, and
the mortgage recording tax (so far as such charges have not already
been paid or taken care of by the borrower) and less a lending
2 fee, at the prevailing rates, which includes its appraisal
charges; and such lending fees constitute a part of the gross
income of the plaintiff. In the case of a building loan, the borrower
upon closing executes a bond and first mortgage to the plaintiff and
the plaintiff makes advances to the borrower in accordance with the
terms of the contract, the charges and lending fee being handled
in the same way as in the case of a loan on improved property.

(b) The plaintiff receives from investors and others requests to
purchase from plaintiff mortgage loans, or participations therein,
the payment of which is to be insured or guaranteed by plaintiff
in the manner hereinafter described, and also frequently invites, and
especially during the years 1921–1924, inclusive, did invite, offers to
purchase said bonds and mortgages or participations therein.
Where the plaintiff holds a mortgage loan satisfactory to the ap-
plicant, the procedure transferring the same to the applicant is in
one of the following ways:

1. The bond and mortgage is sold as a whole and assigned to a
purchaser at its face value. As part of the transaction, the com-
pany delivers to the purchaser its so-called policy of mortgage guar-
anty, a specimen copy of which is attached to the stipulation of
facts herein as Exhibit T. This instrument, Exhibit T, recites the
name of the assignee, and in paragraph marked "First" thereof is

inserted the rate of interest, which is ordinarily one-half of
63 one percentum less than the rate of interest specified in the bond and mortgage itself, and the rate specified in Exhibit T (usually one-half of one percentum as aforesaid) is, when collected, retained by the plaintiff in accordance with the terms of Exhibit T. Such difference is designated a premium in the exhibits attached to the stipulation of facts herein.

(2) The procedure in paragraph (1) above is followed where there is a complete assignment of the bond and mortgage to a single purchaser. The plaintiff also assigns to purchasers fractional interests or participations in bonds and mortgages, especially those for large amounts. For that purpose the plaintiff issues to such holders its so-called "guaranteed first-mortgage certificate," a specimen copy of which is attached to the stipulation of facts herein as Exhibit U. For example, where the original bond and mortgage was for $100,000 with interest at six per cent per annum and the investor paid to the plaintiff $10,000 for a participation therein, Exhibit U would recite the receipt of $10,000, the assignment of an undivided interest to the extent of $10,000 in the bond and mortgage of $100,000 and the guarantee by the plaintiff of the payment to the holder of interest at the rate of five and one-half per cent per annum and of the principal in full. This difference (usually one-half of one per cent) between the rate of interest specified in the bond and mortgage
64 and the rate of interest specified in the participation certificate is retained by the plaintiff, when collected, in accordance with the terms of Exhibit U. Such difference is designated a premium in the exhibits attached to the stipulation of facts herein.

(c) Plaintiff also receives from owners of outstanding bonds and mortgages applications to insure or guarantee in the manner herein described the payment of such bonds and mortgages, as evidenced by its so-called policy, Exhibit T; and in some cases a lender, about to make a mortgage loan, makes it a condition that the plaintiff shall guarantee the payment of the mortgage in which case the application for the so-called policy is submitted by the prospective borrower. In both such cases the plaintiff, if it accepts such application, issues an instrument in the form of Exhibit T for the principal sum of the bond and mortgage, guaranteeing the payment of interest at one-half on one percentum less than the rate specified in the bond and mortgage itself. Such difference between the rate specified in the bond and mortgage itself and the rate specified in Exhibit T is when collected retained by plaintiff in accordance with the terms of Exhibit T. Such difference is designated a premium in the exhibits hereto attached. Before issuing its so-called policy, Exhibits T, the plaintiff causes the customary search and survey to be made, the expense of which is paid by the applicant for the loan. Its business done in this manner, while substantial in amount consti-
65 tutes only a small percentage of the total business of the plaintiff.

(d) In occasional cases there are investors who desire to take mortgage loans, or participations therein, before such loans are closed. In such cases such investors pay to the plaintiff in advance the amount they wish to invest; and the plaintiff upon closing the desired loan, and making the actual advance to the borrower, assigns the bond and mortgage to the investor and delivers to him its so-called policy, Exhibit T, or delivers its guaranteed mortgage certificate, Exhibit U, such transaction being in all other respects similar in detail to those above described.

17. The primary purpose of the plaintiff in making loans on bonds and mortgages is not for investment but for the ultimate sale of the bonds and mortgages, either by way of complete assignments of bond and mortgage or by way of its guaranteed mortgage certificates, the proceeds from such sales being returned into the general funds of the plaintiff, from which investments and reinvestments in similar transactions are made in the ordinary course of plaintiff's business. In assigning a bond and mortgage the plaintiff always enter into the agreement evidenced by Exhibit T, and the assignment of fractional interest in always evidenced by Exhibit U. In neither case does the plaintiff make any profit by selling a bond and mortgage, or a fractional interest therein, at more than its face value or more than the amount advanced by the plaintiff thereon, including therein the charges and fees above described.

66 18. As stated above, the plaintiff in making mortgage loans customarily charges the borrower a fee for its services, known as a lending fee. If, when the mortgage falls due, the borrower desires to extend the time of payment, and the plaintiff is willing to grant such extension, the plaintiff customarily charges the borrower an extension fee, which includes its appraisal services. Such extension fees constitute a part of the gross income of the plaintiff.

Such original loan, and such extensions, are usually for a term of five years, though in the case of small loans the term is frequently three years.

Such lending fees and extension fees charged by the plaintiff are at the prevailing rates charged by lenders, whether individual, partnerships, or corporations under whatever law of the State of New York incorporated, for mortgage loans and extensions in the city of New York, where the plaintiff's business is conducted, the rates for building loans being higher than for loans on improved property since the lender must examine plans and must keep in constant touch with the building operations in order to see that the plans are complied with and to determine when the advances become due.

The plaintiff's lending, extension fees, so-called premiums, and interest earned on bonds and mortgages held by the plaintiff (com-

puted on the accrual basis) were for the years 1922, 1923, and 1924, respectively, as follows:

	Lending fees	Extension fees	Premiums	Interest
Year 1922	$655, 283. 70	$214, 303. 56	$619, 986. 38	$372, 706. 12
Year 1923	990, 855. 37	73, 745. 71	750, 803. 21	426, 841. 31
Year 1924				

67 19. All other corporations incorporated under the provisions of Article V of the insurance law of the State of New York which engage in guaranteeing mortgages follow the same general method of doing business as the plaintiff, with the exception of corporations affiliated with some title or trust company which do business only with such affiliated companies and not with the general public. At least two corporations incorporated under the banking law of the State of New York make mortgage loans and sell bonds and mortgages and participations therein, with their guaranty, in New York City, as their principal business, under the same general method of doing business as the plaintiff, making such reports to the State banking department as are required by the provisions of the banking law.

20. Plaintiff from time to time issues advertising matter in connection with its business, and among such advertising matter issued by plaintiff were the extracts shown in Exhibit V, referred to in the stipulation of facts herein.

21. Commencing with the year 1921, there has been a marked increase in building activity in New York City and a corresponding increase in the demand for mortgage loans, especially building loans.

22. Since April, 1922, the plaintiff has owned and occupied a building at No. 56 Nassau Street, New York, N. Y., as its principal office, in which there are stores for rent. Plaintiff has received rentals from such stores and at times has received rentals for
68 surplus space in some of its branch offices. Apart from such rentals and other incidental amounts, the plaintiff's income consists of the income from its investments, its extension and lending fees, and the so-called premiums described above. All the plaintiff's income and its expenses and other information regarding its business are set forth in its annual reports to the superintendent of insurance of the State of New York. It is agreed that the court may take judicial notice of the published annual reports of the said superintendent.

23. At none of the times material to this action were the plaintiff's assets segregated or earmarked in any way for investment purposes or otherwise, all of its assets and all of its capital, surplus, and undivided profits being employed indiscriminately in its business activities, except that the plaintiff has always maintained a guaranty fund pursuant to the supposed requirements of Article V

of the New York insurance law. That law required corporations organized thereunder to maintain a certain guaranty fund in specified cases of investments. All of the bonds and mortgages obtained by the plaintiff in the manner hereinbefore described were legal investments for such fund; and plaintiff's investments of the classes required for said fund always exceeded the amount required by the statute. But no investments were segregated or earmarked by the plaintiff as being a part of a guaranty fund, the plaintiff always having on hand a sufficient amount of such investments to satisfy said requirements.

69 CONCLUSIONS OF LAW

1. At none of the times material to this action was the plaintiff an insurance company within the meaning of sections 246 and 247 of the revenue act of 1921.

2. The plaintiff is not an insurance company within the meaning of sections 246 and 247 of the revenue act of 1921.

3. The burden is upon the plaintiff to establish its exemption from the operation of section 1000 of the revenue act of 1921.

4. The plaintiff has failed to sustain the burden which is upon it to prove that it was exempt from the operation of section 1000 of the revenue act of 1921 during the years in question.

5. The plaintiff has failed to establish that it was exempt from the payment of the capital-stock tax during the years in question.

6. The taxes in question were legally assessed and lawfully collected.

7. If the plaintiff is not exempt from the operation of section 1000 of the revenue act of 1921, the amount paid by the plaintiff as taxes under that section were properly due the defendant, as collector.

8. The plaintiff has produced no evidence which warrants a judgment in its favor against the defendant.

70 9. Plaintiff has failed to establish that it issued policies of insurance in connection with any of its activities or that it charged a premium in connection with any of its activities.

10. The defendant is entitled to judgment in its favor dismissing the complaint upon the merits.

11. There should be a judgment in favor of the defendant.

I accordingly direct the entry of judgment in favor of the defendant against the plaintiff, adjudging that the complaint herein be dismissed upon the merits and that the defendant have his costs against the plaintiff as taxed, together with the disbursements of this action.

——— ———, *U. S. D. J.*

Refused
F. J. C.

71 In United States District Court

[Title omitted.]

Defendant's objections to findings

The defendant hereby objects to the proposed findings of fa numbered 16 (b1) in so far as it contains therein the clause " a in business usage is called a premium "; paragraph 16 (b2) in so f as it contains the clause " and in business usage is called a premium and to paragraph 16 (c) in so far as it contains the clause " and business usage is called a premium."

The defendant further objects to the conclusions of law propos by the plaintiff numbered 1 and 2.

CHARLES H. TUTTLE,
United States Attorney.

72 In United States District Court

[Title omitted.]

Defendant's exceptions to findings of fact and conclusions of law

1. The defendant hereby excepts to the finding of fact numbere 16 (b1) in so far as it contains therein the clause " and in busine usage is called a premium "; the defendant excepts to the findi of fact numbered paragraph 16 (b2) in so far as it contains t clause " and in business usage is called a premium "; and defenda further excepts to the finding of fact numbered paragraph 16 (in so far as it contains the clause " and in business usage is called premium."

2. The defendant further excepts to the court's refusal to find as finding of fact paragraph 16 of the defendant's proposed findings fact in the language therein contained.

3. The defendant excepts to the conclusions of law numbered o and two and excepts further to the direction of judgment in favor the plaintiff.

73 4. The defendant further excepts to the court's refusal make the following conclusions of law as proposed by t defendant:

Conclusions of law numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 1 respectively.

And further excepts to the court's refusal to grant the defendan motion for judgment dismissing the complaint and the court's r fusal to direct the entry of judgment in favor of the defendant.

Dated, New York, N. Y., October 22, 1929.

CHARLES H. TUTTLE,
United States Attorney for the
Southern District of New York,
Attorney for Defendant.

Office and P. O. address: U. S. Courts and Old P. O. Bldg., Broadway and Park Row, Borough of Manhattan, city of New York.

Order Settling Bill of Exceptions

Upon the annexed consent and on motion of Charles H. Tuttle, U. S. attorney for the Southern District of New York, I hereby sign, settle, and allow the foregoing, together with the exhibits offered in evidence, as and for the defendant's bill of exceptions and order the same to be filed.

Dated, New York, March 20, 1930.

FRANK J. COLEMAN, *U. S. D. J.*

74 We hereby consent to the settling, allowing, and filing of the within, together with the exhibits offered in evidence as and for the defendant's bill of exceptions.

Dated, New York, March 20, 1930.

SHEARMAN & STERLING,
Attorneys for Plaintiff.

75 *Exhibit M*

Address reply to Commissioner of Internal Revenue and refer to MT-CST-2NY-3172-GCD.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, August 20, 1925.

LAWYERS MORTGAGE COMPANY,
56 Nassau Street, New York, New York.

Claim	List	P.	L.	Amount
R24451	August, 1923	52	5	$10,731
R24598	September, 1922	257	4	10,147

GENTLEMEN: Your claims for the refunding of $10,147 and $10,731, capital-stock tax for the taxable periods ended June 30, 1923, and June 30, 1924, respectively, have been considered.

The company contends that it is an insurance company and therefore exempt from liability to capital-stock tax.

Section 1000 (a) of the revenue act of 1921, under which the capital-stock taxes in question were paid, required every domestic corporation to pay annually an excise tax with respect to carrying on or doing business. Subdivision (2) (b) of that section 76 provided that the taxes so imposed should not apply in any year to any insurance company. Section 246 (a) sets forth special provisions for computing the income tax of any insurance company.

The company declares that it was not only organized as a title-guaranty company, but actually carries on an insurance business as such. In support of that petition it points out that it maintains the guaranty fund required by the insurance laws of the State of New York, reports regularly to the superintendent of insurance of the State, and is classed as an insurance company by the State authorities. The company does not do any title insurance business but confines itself solely to the business of insuring the payment of mortgages, or "guaranteeing mortgages," as it is commonly called. In carrying on its business the company engages in many activities. It examines titles and passes on the same; lends money on real-estate security in the form of mortgages; assigns loans and mortgages to investors for a consideration; issues its guaranteed interest-bearing mortgage certificates in almost any amount desired; collects both principal and interest; and guarantees the payment of both principal and interest. It deals with lenders of money as well as borrowers thereof. In a comparatively few cases it makes loans on its own account, but mostly it handles funds for investors.

The income received by the company may be divided in four parts, viz:

(1). Premiums received for mortgage guaranties.
(2). Interest on mortgages and other securities.
77 (3) Fees for examining and passing upon titles.
(4) Amounts received for miscellaneous sources.

The following table show the gross sums received from each of those sources:

Year	1918	1919	1920	1921
Premiums	$658,699	$625,448	$618,713	$589,493
Interest	299,162	379,697	502,614	541,272
Fees	89,821	184,782	392,055	498,685
Misc.		21,484	70,594	3,318
Total	11,047,682	1,211,411	1,583,976	1,632,738

Year	1922	1923	1924
Premiums	$619,986	$750,803.21	$897,167.73
Interest	489,277	521,111.53	545,638.33
Fees	848,543	1,033,313.80	1,086,240.36
Misc.	22,292	51,843.32	45,188.77
Total	1,980,098	2,357,071.86	2,574,194.70

The company explains those figures by stating that premiums received from mortgage guaranties are well recognized sources of income of insurance companies; that as all insurance companies maintain investments the receipt of interest from securities is not inconsistent with its claim to belong to that class; that receipts from

fees are merely incidental to its principal insurance business; and that the miscellaneous receipts, consisting of rent from office buildings, profits on foreclosed real estate, etc., also constitute but incidental income.

As this company was organized under an insurance law of the State of New York and as it is required to make annual reports to the superintendent of insurance of that State, it is evident that
78 it carries on an insurance business. However, it also engages in activities which are not strictly insurance activities, from the exercise of which it receives a large income. So the question to be decided is whether the business as a whole that is carried on by the company is an insurance business.

An examination of the evidence presented shows conclusively that this company also engages in the investment business on a large scale. In an analysis of the entire business carried on by the company two publications recently issued by the company afford pertinent data. One is the annual report of the company, dated January 1, 1925, of which the following are pertinent extracts, viz:

"During the past year, the company's earnings were the largest in its history, the gross earnings being $2,574,195, and the net profits $1,501,208.

"The sales of guaranteed mortgages, including extensions, amounted to $74,088,503, and the net gain in outstanding guaranteed mortgages amounted to $38,973,825.

"Since the Lawyers Mortgage Company was organized it has guaranteed $838,121,541 of mortgages, of which $627,539,494 have been paid in full, leaving now outstanding $210,582,047.

"There has never been in the history of New York such a strong demand for guaranteed mortgages as at the present time, and the difficulty is to obtain sufficient good mortgages to meet the demand. Under the present conditions of rapid expansion of the city
79 of New York, the Lawyers Mortgage Company is more than ever cautious in making mortgage loans, scrutinizing with consent watchfulness the present character and future prospects of the various sections of the city. Due to the ease of financing new building construction with excessive bond issues, prices of land in some locations have risen to very high levels, which the company discounts, in the same way that it discounts the present high cost of building. This prudent course, added to our firm policy, requiring semiannual installments in reduction of the principal of mortgage loans covering new buildings, will protect the clients of this company against any future recessions in the value of New York City real estate.

"* * *

"The special attention of investors is called to our guaranteed first-mortgage certificates, of which the company now has over

$37,000,000 outstanding. These certificates are a legal investmen
for trust funds. They are, moreover, the most convenient and scien
tific development in the mortgage field, combining the maximum o
safety found in guaranteed mortgages and the greatest flexibilit
as to amount found in any prime investment. Any even or odd
amount from $100 to $1,000,000 may be fully invested in those guar
anteed first-mortgage certificates."

The other publication issued by the company is entitled "Ten
Radio Talks on Mortgage Investments." On the second page the
following statements are made, viz:

80 "The sole business of this company is to supply conserva
tive investors with first mortgages on Manhattan, Bronx
Brooklyn, Queens, Nassau, and Westchester real estate with prin
cipal and interest fully guaranteed by this company.

"* * *

"No loss to any investor in our 31 years of operation and we
guarantee there never shall be."

These printed "talks" are on such subjects as The Secret of
Financial Success; Three Rules for the Protection of the Investor
Origin and Development of the Real-Estate Mortgages; and Invest
ment Pitfalls. All these "talks" relate to investments and are
issued for the purpose of attracting investors. The importance of
the particular kind of investments handled by this company, guar
anteed mortgages, is especially emphasized.

This advertising matter thus establishes that this company is hold
ing itself out as one that handles attractive investments. That this
business is very considerable may be gathered from the table of gross
income set forth hereinbefore on page 3. It will be seen therefrom
that during the calendar years 1922, 1923, and 1924, the company's
gross income from premiums for guaranties, purely insurance busi
ness, was $619,986, $750,803.21, and 897,167.72, respectively. During
the same three years the company's income from loan fees, purely
investment business, was $848,543, $1,033,313.80, and $1,086,240.38
respectively. It will thus be seen that the income from the lat
ter source exceeded the income from the former source in a
81 marked degree. With regard to the income from interest on
mortgages and from miscellaneous sources, it is impossible to
classify it as pertaining either to the company's insurance business
or its investment business.

All these facts point to the conclusion that this company is engaged
chiefly in handling real-estate mortgage loans. Its name, the sources
of its income as indicated by the table referred to, its declared pur
pose to supply conservative investors with guaranteed mortgages
all these factors establish that the business carried on by the com
pany is primarily an investment business. It does no guaranty of

insurance business for others but confines its activities in this respect to its own investment securities. In order to make such guaranties, it is required by the laws of New York to incorporate under an insurance law, to report regularly to the insurance commissioner of the State, and to maintain a guaranty fund, as determinative of the business of the company as a whole. It is evident that the insurance functions are but secondary to importance to the activities of the organization. In other words, it insures the investment securities which it offers to the public. The insurance feature merely serves to make the investments more attractive.

This office is therefore of the opinion that your organization can not be classed as an insurance company, which conclusion has also been reached by the Income Tax Unit, and that it is liable to capital-stock tax.

The claims are accordingly rejected.

The records of this office show that the company did not
82 pay any capital-stock tax for the taxable period ended June 30, 1925. An examination of the balance sheet of the return shows the company reported a valuation of $11,389,092, based on the excess of assets over liabilities under Exhibit A. On this basis the fair value and tax due have been determined as follows:

Fair value	$11,389,092
Deduction	5,000
Fair value in excess of $5,000	11,384,092
Tax at $1 for each full $1,000	11,384

This assessment will be listed. Kindly await bill from the collector, to whom payment should be made. No remittance should be sent to Washington.

Respectfully,

D. H. BLAIR, *Commissioner.*

MW

Exhibit Q

No. ____

CONTRACT FOR LOAN AND TITLE INSURANCE

The Lawyers Mortgage Company having approved an application for a loan secured by a mortgage upon premises and terms set forth below, the undersigned applicant hereby agrees to take said
83 loan from Lawyers Mortgage Company or its assigns; to pay to Lawyers Mortgage Company upon the closing all its charges hereinafter specified and all expenses incurred by it and reasonably necessary in the completion of this transaction whether herein specified or not; to execute and deliver or cause to be executed

and delivered or assigned one or more bonds and mortgages in Lawyers Mortgage Company usual form sufficient to constitute or create a single first mortgage lien upon a good and marketable title in fee to said premises free from other and prior encumbrances and one which the title company below named is willing to insure without exception; to give satisfactory assurance or evidence of unconditional ownership of the fixtures installed on said premises; to promptly make known to said Lawyers Mortgage Company any further material facts, affecting the title to said premises that may come to the knowledge of said applicant. The applicant further represents that the statements herein are full and correct to the best of applicant's knowledge and belief and hereby requests and authorizes Lawyers Mortgage Company to employ _____ Company to search and insure the title to said premises and said mortgage and authorizes said title company to apply for certificates in all city departments.

The Lawyers Mortgage Company agrees to make the loan or procure it to be made upon the terms and conditions herein set forth provided the title be closed on or before _____, 19___, and in the case of a building loan, subject to approval of plans, specifications and financial statements of applicant, but reserves the
84 right to decline the loan for any reasonable objection to title, construction of the building, or occupancy not herein disclosed and in such event or in case of the failure of the applicant to take the loan as and when herein provided the applicant will nevertheless pay the charges and expenses as agreed.

Amount of loan, $_____

Rate, _____ % only _____ years.

(If a building loan, the building loan agreement is hereby made a part of this contract.)

Payment or privilege: _____

1. Bond of_____
2. Collateral bond of_____
3. Mortgage by_____
4. Present owner_____

Existing mortgages: Held by _____ to be paid.
" " _____ " " assigned.
Subordinated.

Papers to be obtained by borrower: Satisfaction, assignment, subordination agreement, waiver of liens on fixtures.

Papers to be drawn by _____: Bond, mortgage, extension agreement, release, ownership agreement, lienors' certificate, estoppel certificate, coordination agreement.

Title to be reported to Lawyers Mortgage Company, date _____

Title to close _____, at 56 Nassau Street; time, _____ M.

Premises, _____

Fee, _____

Survey: Order unless Co. has one that can be used. Borrower to pay.

85 Mtge. tax and stamps: Borrower to pay.

D'w'ng papers: Borrower to pay.

Recording; Borrower to pay.

Uncertified checks not acceptable in payment of above charges.

Applicant _____

Address _____

Accepted_____LAWYERS MORTGAGE COMPANY,

By _____

_____

Please examine and report title for above transaction, procure papers, close title, and issue policy to this company. You will collect all costs and disbursements; also our fee, from which your title charges are to be deducted.

Kindly search against any covenants and restrictions before going into examination of title.

LAWYERS MORTGAGE COMPANY,

By _____

[Endorsement on back]

STATE OF NEW YORK,

County of New York, ss:

On the ____ day of _____, 192__, before me came _____, to be known, who being by me duly sworn, did depose and say that he resides in_____;

86 that he is the _____ of the corporation described in, and which executed, the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation; and that he signed his name thereto by like order.

Exhibit R

AGREEMENT, made this ____ day of _____, 19__, between Lawyers Mortgage Company, hereinafter designated as "the lender," and _____, hereinafter designed as "the borrower."

Whereas the borrower owns the land described in Schedule A, hereto annexed, and has applied to the lender for a loan of _____ dollars to aid the borrower in the erection on said land of a structure or structures described in Schedule B, hereto annexed, which said structure or structures are hereinafter referred to as "the building."

Now, therefore, it is agreed between the parties as follows:

1st. The lender accepts such application, and if the borrower proceeds with the erection of the building and observes the terms of this agreement, will loan or procure to be loaned to the borrower,

the sum of ---------- dollars, to be advanced in install-
87 ments as set forth in Schedule C, as hereunto annexed, which loan is to be secured by the bond of the borrower, conditioned for the repayment of the amount so advanced on ----------, with interest thereon from the dates of the various advances at the rate of ---- per cent per annum until the completion of said building, which completion shall be evidenced by a certificate of the lender, and after the delivery of such certificate at the rate of ---- per centum per annum, payable semiannually, and by a mortgage covering said premises, in which the wife, if any, of the borrower, shall join, which mortgage shall be a valid lien on a good and marketable title in fee to said premises for all sums that may be advanced on said bond and mortgage, subject to no encumbrances except such as may be waived by the lender.

Said mortgage shall contain the clauses employed by the Lawyers Mortgage Company in its building-loan mortgages, and is hereinafter referred to as "the mortgage."

2nd. The borrower agrees to take such loan and covenants to observe the terms of this agreement.

3rd. The following provisions shall be observed in and about the construction of the building:

(a) Should the plans or any modification thereof not be in the hands of the lender at the time of the execution of this agreement, they shall be submitted to the lender before they are approved by the superintendent of buildings.

88 (b) The building shall be constructed in strict accordance with the plans and specifications approved by the lender and all material shall be sound and perfect and no second-hand material shall be used.

(c) The lender shall have sufficient notice to permit and examination of the bottom of the trenches before foundation concrete is started.

(d) If there be steel in the construction of the building, the members of the steel work shall be painted after construction, a field coat different from the shop coat; and of a quality of paint approved by the lender.

(e) The details of the floor construction and framing plans shall be submitted to the lender for approval before the contract therefor is let.

(f) Permanent stairs with temporary treads shall be erected as rapidly as the frame work is erected, but if the permanent stairs shall be delayed, temporary plank stairs shall be erected in lieu thereof.

(g) After floor filling is completed and before the wood flooring is laid in each story sufficient notice shall be given to the lender to enable inspection of the same.

(h) The lender shall have sufficient notice when tests of the plumbing and framing systems and structural work are to be made,

and any further tests required by the lender shall be made
89 by the contractors for such work under the direction of the lender, at the expense of the borrower.

(i) The framework of all fireproof buildings shall be of steel and all connections within a three-foot radius of columns shall be riveted.

(j) The lender shall be given an opportunity to examine all cast-iron work used in the construction of the building before it is painted, and no cast-iron members shall be used which are not approved by the lender. Any such member which may not have been so approved which shall be incorporated in the building shall be removed whenever required by the lender.

4th. During the construction of the building the lender and the holder of the mortgage and the lender's architects and engineers may from time to time inspect the building and shall be furnished, if required by them, with copies of all plans, detailed plans, shop drawings, and specifications relating to the construction of the building, and they may examine all plans, detailed plans, shop drawings, and specifications which are kept at the work.

5th. No advance shall be due unless all work usually done at the stage of construction when the advance is payable under the terms of Schedule C be done in a good workmanlike manner, and all materials and fixtures usually furnished and installed at such stage of construction be furnished and installed, nor unless all ironwork and construction be approved by an engineer satisfactory to the lender.

90 Parts or the whole of any instalments may be advanced before they become due if the lender or holder of the mortgage believe it advisable so to do and all such advances or payments shall be deemed to have been made in pursuance of this agreement and not to be modifications thereof. The making of any advance or any part of an advance shall not be deemed an approval or acceptance by the lender or the holder of the mortgage of the work theretofore done. The holder of the mortgage may make any advances or parts of any advances after the happening of any of the events specified in the clause of this agreement numbered 7th without thereby waiving the right to demand payment of the mortgage debt and without becoming liable to make any other or further advance. All advances are to be made at the office of _____ and the borrower is to give to the lender five days' notice in writing before demanding any advance.

6th. If the construction of the building is not carried on with reasonable dispatch, or should be discontinued at any time, the holder of the mortgage may protect or complete the building; if any mechanic's lien or liens should be filed against said premises, such holder may retain or deposit in behalf of the borrower, with the clerk of the county in which said premises are situated, sums sufficient to discharge such lien or liens; if the building be not completed or be

untenanted, such holder may take possession thereof, employ watchmen to protect the building from depredation or injury, and may preserve and protect the fixtures and property therein; if
91 interest should become overdue on any prior mortgage, such holder may pay the same; if any taxes, assessments, or water rates affecting said premises should become due and remain unpaid, such holder may pay the same; any sums paid or expended in accordance with any of the foregoing provisions of this clause shall be deemed to be advanced to the borrower and shall be secured by said bond and the mortgage and, at the option of the holder of the mortgage, may be deducted from any advance thereafter becoming due.

7th. Whenever and as often as any of the following events occur before the amount of said loan is fully advanced, all obligation on the part of the lender or the holder of said mortgage to make or procure any further advances shall cease, if the lender so elect, and further, if either the lender or the holder of said mortgage so elect, the said mortgage debt shall immediately become due and payable, anything in said mortgage or in said bond contained to the contrary notwithstanding:

(a) If a copy of the plans and specifications of the building and of any modifications thereof be not furnished to the lender whenever the lender shall require the same.

(b) If the plans and specifications shall not be satisfactory to the lender.

(c) If the plans be not approved by the building department before an advance is demanded.

(d) If the building be not erected in strict accordance with the plans and specifications approved by the lender.

92 (e) If the materials or construction of the building be not satisfactory to the lender.

(f) If any materials, fixtures or articles used in the construction of the building or appurtenant thereto should be purchased by the borrower or any contractor or other person furnishing labor or materials to the building, so that the absolute ownership of such materials, fixtures or articles will not vest in the borrower immediately on delivery thereof at the building.

(g) If the borrower do not disclose to the lender the names of all persons with whom the borrower contracts or intends to contract for the construction of the building or the furnishing of labor or materials therefor and obtain the acceptance by the lender of such persons as contractors upon the building.

(h) If the borrower do not produce upon demand the contracts, bills of sale or agreements or any of them under which the borrower claims title to the materials, fixtures and articles used in the construction of the building and appurtenant thereto.

(i) If the borrower should not proceed continuously with the erection and completion of the building (stoppage by reason of actual strikes excepted.)

(j) If a survey should show that the building encroaches upon property other than that described in Schedule A, to an extent deemed material by the lender.

93 (k) If there should be at any time any note or notice of violation of law or of any municipal regulation or ordinances filed in or issued by any public department or authority against the building or against the borrower by reason of any matter in or about the construction of the building.

(l) If the building should be materially injured or destroyed by fire or other casualty.

(m) If the borrower do not observe the provisions of the clauses of this agreement numbered 3rd and 4th.

(n) If the borrower should assign this contract or any interest therein, or any right to receive any payment or portion of a payment herein provided for, or give or issue an order on the lender or holder of the mortgage for the payment of any money payable under this agreement.

(o) If a petition in bankruptcy should be filed by or against the borrower.

(p) If the borrower should convey said premises or any interest therein.

(q) If the premises should become encumbered by any lien or encumbrance not herein provided for.

(r) If default should be made in the payment of interest upon any of the mortgages herein mentioned.

(s) If the borrower does not take the advances within fifteen days after they are made payable.

94 The mortgage may contain the foregoing provisions or any of them, but the omission of any such provisions shall not be a waiver of any of them.

8th. So much of the loan as may be required therefor may be applied by the lender to the payment, satisfaction or disposition of any mortgage or mortgages or other encumbrances now affecting the premises or which may hereafter affect the same, and such application may be made whenever the lender shall so elect. So much of the loan as may be necessary for that purpose may be applied under the direction of the borrower to the payment of any fees, brokerage or other expenses incident to the obtaining or making of the loan herein agreed to be made.

9th. The borrower shall pay all fees heretofore agreed to be paid to the lender or any other person or corporation, the expense of examination of title, the recording tax upon the mortgage, the charges for drawing and recording papers and for all searches which may be required by the lender to assure the lender that the mortgage is a lien as herein covenanted; the borrower shall furnish to the lender, or the lender may procure, surveys made by a surveyor satisfactory to the holder of the mortgage whenever required by

such holder; any such fees and charges and the charges for surveys may be deducted from any advance whenever the lender shall elect so to do.

10th. At the option of the lender or holder of the mortgage no advance need be made so long as there is noted in any municipal or other public department any note or notice that the building violates any provision of law or ordinance or does not comply with any provision of law or any ordinance applicable thereto. The borrower shall furnish to the lender official searches made in such departments whenever required so to do.

11th. In case the building be one to which the provisions of the tenement-house law apply—

(a) The first advance shall not be due until the plans shall have been approved by the tenement-house department, and a written certificate to that effect shall have been issued by such department.

(b) No other advance shall be due unless the building shall comply with the provisions of the tenement-house law, so far as such law then may be applicable.

(c) The last advance shall not be due until the borrower shall produce a certificate issued by the tenement-house department that said building conforms, in all respects, to the requirements of said law.

12th. So much of any advance as may be necessary may be applied to the payment of accrued interest on any mortgage mentioned in this contract and to any sums owing by the borrower to the lender for fees, surveys, recording and other proper charges.

13th. That the lender may at any time release portions of the mortgaged premises upon receiving what, in the opinion of the lender, is a proper payment on account of the mortgage debt, and may at any time satisfy any of said mortgages upon receiving the amount due it, without affecting any of its rights under the other mortgages or this agreement.

14th. The lender or any holder of said bond and mortgage may extend the payment of the principal secured by said bond and the mortgage, and any extension so granted shall be deemed made in pursuance of this agreement and not to be a modification thereof.

15th. If more than one building is to be erected under this contract, as specified in Schedule B, and more than one mortgage given, the words "bond," "mortgage," and "building" when they appear shall be read as though written "bonds," "mortgages," and "buildings," and in such case it is hereby further expressly agreed between the lender and the borrower that until all the buildings to be erected on all the premises herein described are completed, and all the advances to be made under this agreement as building loans are made, in case of any default on the part of said borrower, or upon the happening of any event which entitles the lender to elect that the whole sum secured by any one of said bonds and mortgages be forthwith due and payable, the lender may, at its option, elect that all

the bonds and mortgages to be given under this agreement be forthwith due and payable, anything contained herein or in any of said bonds and mortgages to the contrary notwithstanding; and the
97 lender may thereupon, in such a case, proceed to foreclose all of such bonds and mortgages in one action in all respects as though the said mortgages constituted a single blanket mortgage for the aggregate amount of said mortgages, covering all of the premises described in them. In such case all advances made upon each and all of said bonds and mortgages shall be regarded for all purposes as advances made upon such a blanket mortgage, covering all of said premises and secured thereby.

16th. Notices from the lender to the borrower may be given by mailing the same to the borrower, addressed at ----------, and any notice so given shall be deemed to be sufficient for all purposes.

In witness whereof the parties hereto have signed and sealed these presents the day and year first above written.

Schedule A

Annexed to and forming part of the foregoing agreement.

98 Schedule B

Annexed to and forming part of the foregoing agreement.
Bond: ----------
Premises: ----------

SCHEDULE OF ADVANCES TO BE MADE ON WITHIN BUILDING LOAN

1st payment: When the rear and side walls, the walls enclosing stairwells and all interior brick walls are up to the second tier of beams, and the front walls are up to the first tier of beams, and the second tier of beams is laid and fastened in place, the sewer connections are made with the street, and the water connected with the street water mains, the sum of ----------

2nd payment: When the rear and side walls, the walls enclosing stairwells and all interior brick walls are up to the fourth tier of beams, and the front walls are up to the third tier of beams, and the fourth tier of beams is laid and fastened in place, the sum of ----------

3rd payment: When the building is fully enclosed, all bulkheads completed, permanent roof is on and water-tight, the roof copings are on, cornice and skylights are on, chimneys topped up, leaders up and connected from the roof with the sewer, the sum of ----------

4th payment: When the studding and partitions are up, the
99 furring strips and lathing are on, the rough flooring laid throughout, the rough iron plumbing, gas piping and steam

risers installed in place, together with the electric-light wiring, steam heating apparatus is in the cellar, all stairs stepped up, the scratch coat and brown mortar are on, the sum of ----------

5th payment: When the white or finished coat of mortar is on, the sum of ----------

6th payment: When all the standing trim, window casings and the base are complete, the wardrobe and dresses are in place and the stoops and fire escapes finished, the sum of ----------

7th payment: When the doors are hung, except the vestibule doors, the windows are in and glazed, the plumbing is completed and tested, and all sinks, wash-tubs, bath-tubs, lavatories and water-closets are in and connected, dumb-waiters are in and in working order, finished floors laid throughout but not scraped, mantels, if any, fastened in place, the heating and hot-water apparatus installed, and the cementing is finished in the cellar, yards, courts, and sidewalks, the sum of ----------

8th payment: When the finished coat of roofing or slag is on, and the wash-roof completed, and all painting inside and outside of the buildings is done, the hardware is all on, the stairs and stair rails are completed, fences are up, gas ranges, ice boxes, and overhead driers are in place, the electric fixtures are up, and the building is in all respects within and without completed and ready for occu-
100 pancy, except the decorating, and the certificates obtained from the fire underwriters, the building and the tenement-house departments, showing that the house is fully completed according to the requirements of said departments, and that there are no violations of the building laws, and the borrower furnishes satisfactory proof to the lender that the bond and mortgage mentioned herein are first liens upon the heating plant, plumbing work, gas and electric fixtures, the sum of ----------

9th payment: The final payment of ----------

Total, $----------

Schedule D

Annexed to and forming part of the foregoing agreement.

LAWYERS MORTGAGE COMPANY

General specifications for new nonfireproof buildings in order that the provisions of the building loan contract may be specifically observed.

Streets: Where streets are not regulated, graded, and paved, builders shall erect the buildings according to an established
101 grade approved by the city departments, and shall submit survey before starting excavations.

Trenches and footings: The lender shall have sufficient notice to examine trenches and footings for foundations.

Foundations are to be carried to bed rock, or below frost line.

Doubtful foundations and questions relating to the safe sustaining power of a soil, shall be submitted to an engineer selected by the lender.

Brickwork: Brick for fronts and street courts shall be an approved face brick as per samples to be submitted.

Common brick shall be new and hard burnt throughout, laid in cement mortar solid, plumb and to a line. No used brick shall be permitted without the consent of the lender.

Above grade.—Mortar may be mixed with a small portion of hydrated lime.

Furring: All exterior walls shall be furred (except walls covered by adjacent buildings).

Stone: When stone is used for cellar and area walls, same must be laid in a full bed of cement mortar.

If artificial or cast stone is to be used in any part of the structure, special permission must be obtained from the lender before using same.

102 Steel work: Bottom flanges of all steel floor beams shall be covered with Portland-cement mortar over wire mesh.

Steel floor beams shall rest on templates and be properly anchored in walls and fastened or framed to girders. All steel work shall have two coats of paint.

Arches: Floor arches shall be of cinder concrete mixed in proportions, one part of Portland cement, two parts of sand and five parts of clean steam ashes. Cinder fill shall be composed of at least one part of cement and eight parts of cinders.

Framing: All wooden beams shall be properly framed around all floor openings and chimney flues. Headers, trimmers, and tail beams are to be hung in bridle irons. Floor beams bearing on brick walls shall be properly beveled.

Rough flooring shall be provided throughout building and same to be properly laid and well nailed to the beams.

Studding: Top and bottom plates shall be nailed to floor beams.

Bridging for partitions shall be of the "herringbone" method, and the studs at all door openings shall be doubled and set on the 4'' way. Studs for apartment partitions shall be carried down between beams and fire stops provided.

103 Grounds: Grounds shall be applied to the heads and jambs of all door and window openings.

Roofing: Pitch of roof to be properly framed and braced in all directions. The distance between the top of roof beams and the underside of roof boards at the lowest point shall be not less than 1 ft. Suitable air vents shall be provided. Best quality of materials and a type of roofing as approved by the lender. Copper or plastic slate shall be used as flashings. Cast-iron leaders shall be provided inside of building and leader boxes shall be of copper. Outside leaders will not be approved.

Bulkheads: Dumbwaiter bulkheads shall be covered with T. & G. sheathing and galvanized sheet metal.

Elevators: Shall be of an approved type equipped with proper safety devices and all elevator entrance doors shall be framed with steel bucks. A certificate of test must be secured from the bureau of buildings.

Stairs: Permanent stairs with temporary treads shall be provided as rapidly as framework is erected.

Incinerators: When incinerators are to be used, same shall be installed in a separate compartment on each story, which shall be provided with proper lighting facilities.

104 Plumbing test: The lender shall have sufficient notice when water test is to be applied to rough plumbing.

Lathing: All partitions and ceilings of wood beams to be lathed with first-quality spruce, lath free from sap or knots. Where wall tile is to be installed, the best quality of expanded metal lath shall be used and covered with a scratch coat of cement mortar.

Plastering: Plastering on laths shall be three-coat work; on brick walls two-coat work. When patent plaster or lime mortar is used, special care must be exercised in mixing and applying same.

Sufficient time must be allowed for the scratch coat to dry before applying the brown coat. Salient angles shall be protected with metal corner beads.

Plumbing: All lavatories, sinks, and wash trays shall be of vitreous porcelain with compression faucets.

Lavatories to be of pedestal type; water-close's shall be vitreous porcelain with flushometers.

Bathtubs shall be of porcelain or enamelled iron (built in) with compression faucets, and so arranged so as not to obstruct egress to windows; wash-tray covers to be enamelled iron.

Leaders shall be inside, of cast-iron pipe, and leader boxes shall be of copper.

105 All hot and cold water risers and each group of fixtures shall be controlled by gate valves except valves used in angle positions. All rising lines shall be properly proportioned in size. Gas piping shall be of sufficient size to supply all burners and all gas ranges simultaneously.

Approved house pumps shall be provided and arranged for where necessary. An adequate hot-water heating system shall be provided with storage tank, having a capacity of not less than 30 gallons per family.

Steam heating: An adequate steam heating plant shall be provided of sufficient capacity to meet the severest requirements of cold weather. Risers will be permitted in bathrooms and kitchens. All other rooms shall be provided with radiators. All risers shall have shut-off valves on all rising lines in cellar.

Windows: Window frames shall be made tight with proper stops in brickwork and caulked with oakum and pointed with Portland cement or an approval waterproofed compound.

Weather strips: Approved metal weather strips shall be installed for all wooden sashes.

Finished flooring: Finished floors of foyers, private halls, dining and living rooms shall be first-quality oak 7/8" thick
106 tongue and grooved. All other rooms may have number one comb grain pine floors. If same is used, no other quality will be accepted. An approved deafening felt shall be laid under all finished floors.

Trim: All trim must be of good quality and approved by the lender.

Tiles: The walls of all bathrooms must be tiled with the best grade of tile, to a height of at least 4 feet above floor.

The floors of all bathrooms, entrance halls, and stair landings shall be tiled with the best grade of tile, square or hexagon in shape.

Electric work: Specifications and wiring plan plan shall be submitted for lender's approval.

Hardware: Hardware provided shall be commensurate with the character of the buildings.

Fire escapes: Railings for front fire escapes shall be of a neat ornamental design.

The above specifications are for the general work of the
107 ____-story apartment house to be erected at _____ in accordance with accompanying drawings by—

_____, architect.

_____, builders.

By _____.

STATE OF NEW YORK,
CITY OF NEW YORK,
County of _____, *ss:*

On this ____ day of _____, in the year one thousand nine hundred and _____, before me personally came _____, to me known, who, being by me duly sworn, did depose and say that he resides in _____; that he is the _____ of _____, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

108 STATE OF NEW YORK,
CITY OF NEW YORK,
County of _____, *ss:*

On this ____ day of _____, in the year one thousand nine hundred and _____, before me personally came _____, to me known, who, being by me duly sworn, did depose and say that he resides in _____; that he is the _____ of _____, the corporation described in and which executed the foregoing instrument; that he knows the seal of said

corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

109 STATE OF NEW YORK,
CITY OF NEW YORK,
County of ----------, *ss:*

On this ____ day of ----------, in the year nineteen hundred and --------, before me personally came ----------, to me known to be the individual described in, and who executed the foregoing instrument and acknowledged to me that he executed the same.

[Endorsement on back]

Mtge. No. ____
Title No. ____

Lawyers Mortgage Company with contract for building loan.
Lawyers Mortgage Company, 56 Nassau Street, Borough of Manhattan, and 184 Montague Street, Borough of Brooklyn, New York City; 161–01 Jamaica Ave., Jamaica.

110 *Exhibit S*

Know all men by these presents, that ____, hereinafter designated as the obligor , do hereby acknowledge ---------- to be justly indebted to Lawyers Mortgage Company, hereinafter designated as the obligee, in the sum of ---------- dollars, lawful money of the United States, which sum said obligor do hereby ---------- covenant to pay the said obligee, its successors or assigns, on the ____ day of ----------, nineteen hundred and --------, with interest thereon to be computed from the -------- day of ----------, 192__, at the rate of ____ per centum per annum, and to be paid on the ____ day of ---------- next ensuing the date hereof, and semiannually thereafter.

It is hereby expressly agreed that the said principal sum shall become due at the option of the said obligee, or the successors or assigns of the obligee, after default in the payment of interest for thirty days, or after default in the payment of any tax, assessment or water rates for thirty days after notice and demand, or after default in the payment of any instalment of principal, or after any other default, or upon the happening of any event by which, in any case, under the terms of the mortgage securing this bond, the said principal sum may or shall become due and payable; also that all of the covenants and agreements made by the said obligor in said mortgage are hereby made part of this instrument.

Signed and sealed this ____ day of ----------, 192__.
In the presence of—

---

111 STATE OF NEW YORK,
County of ----------, *ss:*

On this ---- day of ----------, in the year one thousand nine hundred and --------, before me personally came ----------, to me known and known to me to be ------ the individual described in and who executed the foregoing instrument and ------ duly acknowledged that he executed the same.

STATE OF NEW YORK,
County of ----------, *ss:*

On this ---- day of ----------, in the year one thousand nine hundred and --------, before me personally came ----------, to me known and known to me to be ------ the individual described in and who executed the foregoing instrument and ------ duly acknowledged that he executed the same.

STATE OF NEW YORK,
County of ----------, *ss:*

On this ---- day of ----------, in the year one thousand nine hundred and --------, before me personally came ----------, subscribing witness to the foregoing instrument, with whom I am personally acquainted, who, being by me duly sworn, did de-
112 pose and say, that he resides in----------; that he knows ----------, the individual described in and who executed the foregoing instrument; that he was present and saw ------ execute and deliver the same, and that he, said witness, thereupon at the same time subscribed h name as witness thereto.

STATE OF NEW YORK,
County of ----------, *ss:*

On this ---- day of ----------, in the year one thousand nine hundred and --------, before me personally came----------, to me known, who being by me duly sworn, did depose and say that he resides in ----------; that he is the ---------- of the corporation described in, and which executed, the foregoing instrument; that he knows the corporate seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

113 [Endorsement on back]

Mortgaged premises: _____
Land section No. ____
Block No. ____
Lot No. ____
(Diagram.)
Approved as to form.
Mtge. No. ____
Title No. ____
Address: _____
To Lawyers Mortgage Company.

BOND

Amount, $_____
Dated, _____, 19___
Principal due, _____, 19___
Interest payable, _____
Interest rate, _____

Lawyers Mortgage Company, 56 Nassau Street, Borough of Manhattan; 184 Montague Street, Brooklyn; 4 Herriman Avenue, Jamaica; New York City

THIS MORTGAGE, made the _____ day of _____, nineteen hundred and _____, between _____, the mortgagor, and Lawyers Mortgage Company, whose principal
114 place of business is at number 56 Nassau Street, in the Borough of Manhattan of the city of New York, the mortgagee,

Witnesseth, that to secure the payment of an indebtedness in the sum of _____ dollars, lawful money of the United States, to be paid on the _____ day of _____, nineteen hundred and _____, with interest thereon to be computed from _____, at the rate of _____ per centum per annum, and to be paid according to a certain bond or obligation bearing even date herewith, the mortgagor hereby mortgages to the mortgagee

Together with all fixtures and articles of personal property, now or hereafter attached to, or used in connection with, the premises, all of which are covered by this mortgage.

And the mortgagor covenants with the mortgagee as follows:

1. That the mortgagor will pay the indebtedness as hereinbefore provided.

2. That the mortgagor will keep the buildings on the premises insured against loss by fire for the benefit of the mortgagee.

3. That no building on the premises shall be removed or demolished without the consent of the mortgagee.

4. That the whole of said principal sum shall become due after default in the payment of any installment of principal or of
115 interest for thirty days, or after default in the payment of any tax, water rate or assessment for thirty days after notice and demand.

5. That the holder of this mortgage, in any action to foreclose it, shall be entitled to the appointment of a receiver.

6. That the mortgagor will pay all taxes, assessments, or water rates, and in default thereof, the mortgagee may pay the same.

7. That the mortgagor within six days upon request in person or within thirty days upon request by mail will furnish a statement of the amount due on this mortgage.

8. That notice and demand or request may be in writing and may be served in person or by mail.

9. That the mortgagor warrants the title to the premises.

10. That in case of a sale, said premises, or so much thereof as may be affected by this mortgage, may be sold in one parcel.

11. That the whole of said principal sum shall become due at the option of the mortgagee after default for sixty days after notice and demand, in the payment of any installment of any assessment for local improvements heretofore or hereafter laid, which is or may become payable in annual installments and which has affected, now affects, or hereafter may affect the said premises, notwithstand-
116 ing that such installment be not due and payable at the time of such notice and demand; and also that the whole of said principal sum shall become due at the option of the mortgagee upon any default in keeping the buildings on said premises insured against loss by fire as required by paragraph No. 2 above, or immediately upon the actual or threatened demolition or removal of any building erected or to be erected upon said premises, or if after application by any holder of this mortgage to two or more fire-insurance companies lawfully doing business in the State of New York and issuing policies of fire insurance upon buildings situate in the place where the mortgaged premises are situate, the companies to which such application has been made shall refuse to issue such policies.

12. In the event of the passage after the date of this mortgage of any law of the State of New York, deducting from the value of land for the purposes of taxation any lien thereon, or changing in any way the laws for the taxation of mortgages or debts secured by mortgage for State or local purposes, or the manner of the collection of any such taxes, so as to affect this mortgage, the holder of this mortgage and of the debt which it secures, shall have the right to give thirty days' written notice to the owner of the mortgaged premises requiring the payment of the mortgage debt. If such notice be given, the said debt shall become due, payable, and collectible at the expiration of said thirty days.

13. That the holder of this mortgage in any action to foreclose it, shall be entitled (without notice and without regard to the
117 adequacy of any security for the debt) to the appointment of a receiver of the rents and profits of said premises, and in the event of any default in paying said principal or interest, such rents and profits are hereby assigned to the holder of this mortgage as further security from the payment of said indebtedness.

14. That the whole of said principal sum shall become due at the option of the mortgagee, if the buildings on said premises are not maintained in reasonably good repair or upon the failure of any owner of said premises to comply with the requirement of any department of the State or city of New York, within three months after an order making such requirement has been issued by any said State or city department.

15. And the mortgagor does further covenant and agree, anything herein contained to the contrary notwithstanding, that, in default of the payment by the mortgagor of any taxes, assessments, or water rates which may be imposed by law upon the said mortgaged premises, or any part thereof, when the same shall become due and payable, it shall and may be lawful for the said mortgagee, without notice to or demand from the mortgagor, to pay the amount of any such tax, assessment, or water rates, and any amount so paid the mortgagor covenants and agrees to repay to the mortgagee, with interest thereon, without notice or demand, and the same shall be a lien on the said premises, and be secured by the said bond and by these presents; and the whole amount hereby secured, if not then due, shall thereupon, if the mortgagee so elect, become due and payable forthwith.

118 In witness whereof this mortgage has been duly executed by the mortgagor.

In the presence of—

_____.

STATE OF _____,

County of _____, *ss:*

On the _____ day of _____, 192__, before me came _____, to me known to be the individual described in, and who executed the foregoing instrument and acknowledged that _____ executed the same.

STATE OF _____,

County of _____, *ss:*

On the _____ day of _____, 192__, before me came _____, to me known to be the individual described in, and who executed the foregoing instrument and acknowledged that _____ executed the same.

STATE OF _____,

County of _____, *ss:*

On the _____ day of _____, 19__, before me came _____, to me known, who, being by me duly sworn,

did depose and say that he resides in ----------;
119 that he is the ---------- of the corporation described in, and which executed, the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation; and that he signed ------ name thereto by like order.

Approved as to form.
Mtge. No. ----
Title No. ----
To Lawyers Mortgage Company.

Mortgage.
Dated, ----------, 192--
Amount, $----------

The land affected by the within instrument lies in section ----, in block ----, on the land map of the ----------

Lawyers Mortgage Company, 56 Nassau Street, Borough of Manhattan; 184 Montague Street, Borough of Brooklyn; 4 Herriman Avenue, Jamaica; New York City.

120 *Exhibit T*

Policy No. ---- Amount, $----------

Lawyers Mortgage Company, 56 Nassau Street, New York City

The Lawyers Mortgage Company, hereinafter termed "the company"), in consideration of the premium and terms of guarantee named below, hereby guarantees to ----------, address ----------, and to such legal representative, succes'ors, or assigns of the above as shall present to the company satisfactory proof of ownership of this policy and of the bond and mortgage described in Schedule A (all of whom are herein designated as "the assured"):

First. Payment of interest at the rate of ---- per cent per annum, subject to such deduction for income tax as may be required by law, within five days after the same shall have become due under the terms of said bond and mortgage upon the amount of the principal sum hereby guaranteed at any time outstanding until said principal sum shall be wholly paid.

Second. Payment of the principal sum of ---------- dollars, secured by said bond and mortgage as and when collected, but in any event within eighteen months after payment shall be demanded in writing by the assured, provided such demand be made after said principal sum shall have become due under the terms of the said bond and mortgage.

121 By the acceptance of this policy the company is irrevocably appointed the exclusive agent of the assured at its own expense

to sue for and receive the proceeds of any policy of title insurance and of any policy of fire insurance covering the mortgaged premises and to collect the interest on the bond and mortgage hereby guaranteed and to exercise every option or privilege in said bond and mortgage or either of them contained and given to the mortgagee; and the assured agrees until the breach or termination of this guarantee to refrain from exercising any such option or privilege and from collecting any part of said interest or of the principal secured by said bond and mortgage except through the company and to permit the company to retain as its premium for this guarantee all interest collected in excess of the rate guaranteed above.

This policy is subject to the agreements, conditions, and general provisions hereto annexed and to such others as may be endorsed hereon and signed by an officer of the company, all of which are hereby made a part of this contract.

In witness whereof the corporate seal of the said company is hereunto affixed and these presents signed by its proper officers thereunto duly authorized, this ------ day of ----------, in the year one thousand nine hundred and --------.

LAWZUS MORTGAGE COMPANY,

By ----------

Attest:

Asst. Secretary.

122 Schedule A

The bond covered by this guarantee was made by ----------
---------- to ----------, dated ----------,
and is marked for identification with the number of this guarantee and the signature of one of the officers of the company.

It was given for the payment of ---------- dollars on the ------ day of ----------, with interest at the rate of ---- per cent per annum, payable on the ------ day of ---------- and ---------- in each year.

The mortgage given to secure said bond is similarly identified and was made by ---------- to ---------- dated ----------, and recorded in ---------- County ---------- office on the ------ day of ----------.

The location and description of the real property covered by the mortgage guaranteed under this policy is shown by the annexed diagram.

(Diagram.)

AGREEMENTS

The company is further bound:

First. To institute and conduct as and when it may deem expedient but without expenses to the assured all such proceedings as may

be necessary to enforce payment of said bond and mortgage or the fulfillment of the other covenants and agreements contained therein.

123 Second. To keep the title to the mortgaged premises guaranteed to the amount of this policy during the life hereof.

Third. To keep the mortgaged premises adequately insured against fire and to require the owner thereof to pay all such taxes, assessments, and water rates and all such fire insurance premiums as by the terms of the mortgage are required to be paid.

CONDITIONS

The assured is bound:

First. To notify the company promptly in writing of any assignment of said bond and mortgage and of any action or proceeding of which the assured has knowledge affecting said bond and mortgage.

Second. To forward to the company promptly any and all notices relating to any policy of fire insurance affecting the mortgaged premises.

Third. To permit the company, and the company is hereby authorized without further action by the assured, at any time when said bond and mortgage shall become due, either by the terms thereof or by reason of the exercise of any option given therein to the mortgagee, to enforce payment of the same in the name of the assured, by its own agents and attorneys but without expense to the assured either by foreclosure or otherwise; and on notice from the company to produce and deposit with it for that purpose the

124 bond and mortgage, all securities collateral thereto and all muniments of title relative thereto held by the assured, and to execute and verify such proofs and pleadings as may be required by the company in the course of such proceedings, and out of the proceeds of such action to permit the company to receive so much as may remain after paying to the assured whatever may be due the assured for principal and interest at the rate hereby guaranteed.

Fourth. To permit the company to buy in the property covered by said bond and mortgage and to take title thereto in the name of the assured, in case at any sale of said property in any foreclosure suit brought by the company in the name of the assured no bid shall be received for said property sufficient to cover the amount of the judgment and the expenses of the sale. In case the said property shall be so purchased by the company in the name of the assured, the company shall be entitled, upon paying the assured, his executors, administrators or assigns within the time limited in the foregoing policy, the amount of the principal of said mortgage together with interest thereon at the rate hereby guaranteed (in so far as the same has not already been paid), to the conveyance of the said property to it or its nominee by the assured or his heirs devisees, free and clear of all claims, charges and liens thereon created by the assured since the purchase thereon upon the said fore-

closure and to an assignment of the deficiency judgment entered in said foreclosure action. Until such payment or until the time shall have expired within which same may be made by the com-
125 pany, the company shall be entitled to the possession and management of the said property and to control the leasing, repairs and maintenance and insurance thereof at its own expense and to receive the rents and profits thereof, but at all times the liability of the company under this policy shall continue until the assured shall have received the full amount of the principal guaranteed hereby with interest thereon at the rate guaranteed hereby.

Fifth. To assign and deliver said bond and mortgage to the company if required to do so whenever the assured is entitled to require payment thereof, upon receipt from the company of the full amount due the assured under this policy upon said bond and mortgage.

GENERAL PROVISIONS

This policy may be assigned by the assured, by written assignment, to any person to whom the said bond and mortgage or any interest therein may have been transferred, provided that the assignment of such bond and mortgage, or of such interest therein, shall also be in writing, duly acknowledged or proved according to law, and that, if not duly recorded, such assignment, or a duplicate or a certified copy thereof as the company may require shall be deposited with the company.

All notices or demands provided for in this policy shall be in writing and may be sent by mail.

The address of the assured to which notices shall be sent shall be deemed to be the address stated herein or such other address as may have been furnished by the assured to the company in writing for this purpose.

126 All notices to or demands on the company shall be sent to its principal office in the Borough of Manhattan, in the city of New York, and all payments by this company of principal and interest shall be made at said place.

(Reverse side)

For value received_____assign the within policy to_____
Dated _____ _____
Witness: _____ _____
Approved: LAWYERS MORTGAGE COMPANY,
_____
_____
For value received_____assign the within policy to_____
Dated _____ _____
Witness: _____ _____
Approved: LAWYERS MORTGAGE COMPANY,
_____
_____

127 Policy No. ____

Policy of mortgage guarantee. Lawyers Mortgage Company. Capital & surplus, $19,000,000. 56 Nassau Street, New York; 184 Montague Street, Brooklyn; 161-01 Jamaica Avenue, Jamaica; 17 Prospect Ave., Mt. Vernon.

Bond of _____
For $_____ Due _____
Interest payable _____
Property: _____

The Lawyers Mortgage Company maintains title insurance guaranteeing title to the within-described mortgage and that said mortgage is a valid first lien on a good and marketable title in fee to the property therein described.

128 *Exhibit U*

Series No. ____ Certificate No. ____

Lawyers Mortgage Company, incorporated as a title guaranty corporation under the laws of the State of New York (hereinafter termed "the company")

In consideration of the sum of _____ dollars, receipt of which is hereby acknowledged, has assigned and transferred and by these presents does assign and transfer unto _____, hereinafter termed "the assured," an undivided share or interest to the extent of said principal sum in _____, and the company hereby certifies that it holds said bond and mortgage, together with any guarantees of payment, insurance policies, and other instruments and evidences of title relating thereto, for the benefit of the assured and of any other persons interested in said bond and mortgage; and that the share or interest represented by this certificate is not subordinate to any other shares in said bond and mortgage and is not subject to any prior interest therein; and that this certificate is one of a series, all of like tenor, issued or to be issued for various sums to a total amount not in excess of _____ dollars, all secured by the bond and mortgage above described, which is a valid first lien upon the real property therein described; and that the said property has been appraised as being worth at least fifty per centum more than the total authorized amount of this series of certificates.

129 And the company hereby guarantees to said assured or to any other lawful holder hereof:

1st. Payment of interest at the rate of ____ per cent per annum, subject to such deduction for income tax as may be required by law, within five days after the same shall have become due under the

terms of said bond and mortgage upon the amount of the principal sum hereby guaranteed at any time outstanding, until said principal sum shall be wholly paid.

2nd. Payment of the principal sum of _____ dollars hereby guaranteed, secured by said bond and mortgage, as and when collected, but in any event, within eighteen months after payment shall be demanded by the assured, provided such demand be made in writing after said principal sum shall have become due under the terms of said bond and mortgage, subject, however, to the following conditions hereby mutually agreed upon between the company and the assured;

A. The company is appointed irrevocably by the assured as the agent of the assured to collect, sue for, and receive the principal and interest secured to be paid by said bond and mortgage, and to satisfy and discharge the said mortgage, in its own name on receiving full payment thereof; to collect, sue for, and receive and settle or compromise the fire insurance in case of loss by fire; and to exercise every right, option, or privilege in said bond and mortgage or either of them contained and given to the mortgagee.

130 B. Whenever the principal sum secured by said bond and mortgage shall become due for any cause, the company shall have the right without expense to the assured to collect said mortgage, and out of the proceeds of such collection to retain so much as may remain after paying to the assured whatever may be due to the assured of principal and interest on this certificate.

C. The company shall give to the assured written notice of the time of the payment of the principal sum secured by said bond and mortgage, by mailing the same to the assured at the address left by the assured with said company in writing, and upon payment of said bond and mortgage, the said mortgage may be cancelled of record, although the assured may fail to present this certificate. If the assured shall fail so to present this certificate, then upon such payment to the company, said sum hereby guaranteed may be held by the company to the credit of the assured or it may be deposited in a trust company in the city of New York, together with interest thereon to the date of such deposit at the rate aforesaid, as a special deposit for the benefit and credit of the assured, to be paid to the assured with such interest as may be allowed by the said trust company upon the surrender of this certificate to the trust company; and from the time of such deposit all interest hereby guaranteed and all responsibility of the company hereunder shall cease.

The company is bound:

131 To institute and conduct as and when it may deem expedient but without expense to the assured all such proceedings as may be necessary to enforce payment of said bond and mortgage or the fulfillment of the other covenants and agreements contained therein; to keep the title to the mortgaged premises guaranteed to the amount of this certificate during the life hereof; to keep the

mortgaged premises adequately insured against fire and to require the owner thereof to pay all such taxes, assessments and water rates and all such fire insurance premiums as by the terms of the mortgage are required to be paid.

Any excess of interest collected by the company on said bond and mortgage beyond the rate above mentioned in this certificate shall belong to the company.

This certificate may be assigned by endorsement but only when such assignment is registered on the books of the company.

Both principal and interest shall be payable at the principal office of the company in the city of New York.

In witness whereof the corporate seal of the said company is hereunto affixed and these presents signed by its proper officers thereunto duly authorized, this ------ day of ----------, in the year one thousand nine hundred and --------

LAWYERS MORTGAGE COMPANY.

By ----------

(Seal.)
Attest:

----------,
Assistant Secretary.

132 (Reverse side)

ASSIGNMENT

For value received ---------- assign the within certificate to ----------

---

Dated ----------
Witness: ----------

Registered on books of company.
Date ----------
Registration ----------

(Front of folder)

GUARANTEED FIRST-MORTGAGE CERTIFICATE

Amount, $----------
@----%
Series No. ---- Certificate No. ----
Secured by mortgage covering premises ----------

The company holds the bond and mortgage, title policy, and fire insurance covering the mortgaged premises. Principal and interest guaranteed by Lawyers Mortgage Company, 56 Nassau Street, New York.

133 *Exhibit W*

TREASURY DEPARTMENT

Washington

(Seal.)

Office of Commissioner of Internal Revenue.

Address reply to Commissioner of Internal Revenue and refer to MT-CST-2 N.Y.-3172—GCD, C1-R24451-R24598.

LAWYERS MORTGAGE COMPANY,

56 Nassau Street, New York, New York.

GENTLEMEN: Receipt is acknowledged of your letter of November 17, 1924, relative to claims filed for the refunding of $10,147 and $10,731, capital-stock tax for the taxable periods ended June 30, 1923 and 1924, respectively.

Communication has been received from the Income Tax Unit to the effect that as the result of an audit of your returns, with correspondence and all available information on hand, that your organization cannot be held as an insurance company. The outstanding facts that would seem to preclude the corporation from the status of an insurance company are as follows:

(1) During the year 1922 the total income of the company, as reflected by the return, amounted to $1,954,318.56. Of this
134 amount $655,283.70, or approximately 33%, was received as fees for placing loans on guaranteed mortgages; $214,303.56, or 10%, as fees for extending loans in force; and in addition thereto about $400,000, interest was received on mortgage loans.

(2) The amount of straight insurance business (guaranteeing mortgages) is only 35% of the total business done.

(3) On the return it is stated that the company sells guaranteed mortgages secured by New York City real estate.

In view of the foregoing facts this office is of the opinion that the company is liable for capital-stock tax, and the claims have been recommended for rejection and forwarded to the solicitor for final action. He has been advised that you desire a hearing on the claims at the time they are taken up for consideration, and no doubt you will be informed as to the date of such a conference.

Respectfully,

(Signed) R. M. ESTES,
Deputy Commissioner.

MB.

135 In United States Circuit Court of Appeals, Second Circuit

[Title omitted.]

Order dispensing with printing of certain exhibits

Upon the annexed consent and on motion of Charles H. Tuttle, United States attorney, attorney for defendant-appellant, it is hereby

Ordered that the following exhibits need not be printed in the record on appeal, but the same may be referred to on the argument and shall be deemed as part of said record as if printed therein:

Exhibit A—Copy of charter or certificate of incorporation of Lawyers Mortgage filed on or about February 9, 1893.

Exhibit B—Amended certificate of incorporation filed on or about January 10, 1905.

Exhibit C—Amended certificate of incorporation with the consent of the superintendent of insurance filed on or about January 18, 1913.

136 Exhibit D—Annual statements of condition as of December 31, 1921, filed with the superintendent of insurance.

Exhibit E—Annual statements of condition as of December 31, 1922, filed with the superintendent of insurance.

Exhibit F—Annual reports furnished stockholders showing condition of the company for the calendar year 1921.

Exhibit G—Annual reports furnished stockholders showing condition of the company for the calendar year 1922.

Exhibit H—A copy of plaintiff's by-laws in effect during the calendar years 1921 and 1922.

Exhibit I—Capital-stock tax return for the period from July 1, 1922, to June 30, 1923, inclusive, filed on July 29, 1922.

Exhibit J—Claim for refund filed on or about November 14, 1923.

Exhibit K—Capital-stock tax return filed on or about July 27, 1923, for the period from July 1, 1923, to June 30, 1924.

Exhibit L—Claim for refund filed on or about November 14, 1923.

Exhibit N—Consolidated income-tax return filed on or about March 15, 1922, for plaintiff and subsidiary companies for the calendar year 1921.

Exhibit O—Consolidated income-tax return filed March 14, 1923, for itself and subsidiary companies for the calendar year 1922.

Exhibit P—Consolidated income-tax return for itself and subsidiary companies filed March 15, 1924, for the calendar year 1923.

137 Exhibit V—Scrapbook kept by the secretary of the plaintiff containing newspaper and pamphlet advertisements.

Defendant's exhibits

Exhibit X1—Pamphlet entitled "Specialists in Safety."

Exhibits X2, X3, and X4—Blank forms.

Exhibit X5—Blank mortgage certificate.

Exhibit X6—Sample guaranty policy.

Dated, New York, March 28, 1930.

MARTIN T. MANTON,
United States Circuit Judge.

Entry of the foregoing order is hereby consented to without further notice.

Dated, New York, March 27, 1930.

SHERMAN & STERLING,
Attorneys for Plaintiff-Appellee.
CHARLES H. TUTTLE,
United States Attorney,
Attorney for Defendant-Appellant.

138 In United States District Court

[Title omitted.]

Assignments of error

Now comes the defendant, by Charles H. Tuttle, United States attorney, and says that in the record and proceedings in the above-entitled cause there is manifest error which occurred at the trial of said cause upon which he will rely in the prosecution of his appeal in the above-entitled cause in this, to wit:

First. The court erred in failing to dismiss the complaint herein.

Second. The court erred in directing judgment in favor of the plaintiff and against the defendant.

Third. The court erred in holding that at all the times material to this action the plaintiff was an insurance company within the meaning of sections 246, 247, and 1000 of the revenue act of 1921, and accordingly was not subject to the capital-stock tax imposed by sec. 1000 of said revenue act.

138 Fourth. The court erred in failing to grant the defendant's motion for the entry of judgment in his favor dismissing the complaint.

Fifth. The court erred in failing to direct the entry of judgment in favor of the defendant, and against the plaintiff, dismissing the complaint upon all the evidence adduced upon the trial.

Sixth. The court erred in admitting testimony to the effect that the difference in interest between that specified in the bonds and mortgages and that specified in the so-called "policy" or participation certificates is called a premium in business usage.

Seventh. The court erred in failing to hold that the burden is upon the plaintiff to establish its exemption from the operation of section 1000 of the revenue act of 1921.

Eighth. The court erred in failing to hold that the plaintiff has failed to sustain the burden which is upon it to prove that it was exempt from the operation of section 1000 of the revenue act of 1921 during the years in question.

Ninth. The court erred in failing to hold that the plaintiff has failed to establish that it was exempt from the payment of the capital-stock tax during the years in question.

Tenth. The court erred in failing to hold that the taxes in question were legally assessed and lawfully collected.

140 Eleventh. The court erred in failing to hold that the plaintiff has failed to establish that it issued policies of insurance in connection with any of its activities or that it charged a premium in connection with any of its activities.

Wherefore defendant prays that the judgment herein in favor of the plaintiff may be reversed and held for naught and that said defendant may be restored to all things which he has lost by reason of said judgment.

Dated, New York, N. J., January 7, 1930.

CHARLES H. TUTTLE,
United States Attorney for the
Southern District of New York,
Attorney for the Defandant.

Office and P. O. address: U. S. Courts and Old P. O. Bldg., Borough of Manhattan, city of New York.

141 In United States District Court

[Title omitted.]

Petition and Allowance of Appeal

Now comes the defendant, Frank K. Bowers, collector of internal revenue, and says that on the 22nd day of October, 1929, the court entered judgment herein against him in the sum of $20,878.00 with interest and costs, and that by said judgment certain errors were committed to the prejudice of the defendant, all of which will more fully appear from the assignments of error filed with this petition.

Wherefore the defendant prays an appeal from said judgment to the Circuit Court of Appeals for the Second Circuit for the correction of the errors so complained of, and for the allowance of said appeal and leave to prosecute the same and a reversal of said judgment, and that a transcript of the record and the proceedings in this cause duly authenticated be forwarded to said Circuit Court of Appeals.

142 Dated, New York, N. Y., January 7, 1930.

CHARLES H. TUTTLE,
United States Attorney for the
Southern District of New York,
Attorney for Defendant.

Office and P. O. address: U. S. Courts and Old P. O. Bldg., Borough of Manhattan, city of New York.

The above appeal as prayed for is hereby allowed.

FRANK J. COLEMAN,
United States District Judge.

143 [Citation in usual form omitted in printing.]

144 In United States District Court

[Title omitted.]

Stipulation as to record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated, New York, April 14, 1930.

SHEARMAN & STERLING,
Attorneys for Plaintiff.
CHARLES H. TUTTLE,
United States Attorney,
Attorney for Defendant.

145 [Clerk's certificate to foregoing transcript omitted in printing.]

146 In United States Circuit Court of Appeals for the Second Circuit

No. 16—October term, 1930

Argued January 16, 1931. Decided June 1, 1931

LAWYERS' MORTGAGE COMPANY, PLAINTIFF-APPELLEE

v.

FRANK K. BOWERS, COLLECTOR OF INTERNAL REVENUE, DEFENDANT-appellant

Appeal from the District Court of the United States for the Southern District of New York

Before L. HAND, SWAN, and CHASE, Circuit Judges

Action by Lawyers' Mortgage Company, a New York corporation, against defendant, Bowers, to recover capital-stock taxes paid to him as collector of internal revenue for the years ending on June 30, 1923 and 1924, respectively. After trial without a jury upon an agreed statement of facts judgment was entered against defendant, and a certificate of probable cause was issued pursuant to section 989 of the Revised Statutes (28 U. S. C. A., § 842). The defendant appeals. Judgment affirmed.

For opinion below see (D. C.) 34 F. (2d) 504.

Robert E. Manley, acting U. S. atty., of New York City (Samuel C. Coleman and Frank Chambers, asst. U. S. attys., both of New York City, of counsel), for appellant.

Shearman & Sterling, of New York City (Harry W. Forbes, of New York City, of counsel), for appellee.

Opinion

SWAN, Circuit Judge:

After this appeal was taken the defendant died. Upon the argument this fact was suggested, and his executor, appearing by attorney and so requesting, was admitted as a party to the suit pursuant to rule 17 of this court. Some question was raised by the appellee, though the point was not pressed, whether the appeal ought to be continued by the defendant's executor or by his successor in the office of collector of internal revenue. In the light of the authorities it seems clear that the executor may properly be substituted. An action for the recovery of taxes illegally collected is based on the collector's personal liability resulting from the receipt of money wrongfully exacted by him; hence it can not be initiated against a successor in office who had no part in the collection or disbursement of the taxes, nor, despite the act of February 8, 1899 (30 Stat. 822 (28 U. S. C. A., § 780, note)), can it be continued against such successor in office. (Smietanka v. Indiana Steel Co., 257 U. S. 1, 5, 42 S. Ct. 1, 66 L. Ed. 99; Union Trust Co. v. Wardell, 258 U. S. 537, 542, 42 S. Ct. 393, 66 L. Ed. 753.) Although the act of February 8, 1899, was amended in 1925 (43 Stat. 941 (28 U. S. C. A., § 780)), we see nothing in the amendment to cause a change in the rule of the Wardell case. That question, however, need not be now determined, for there has been no effort to bring in the defendant's successor in office. That the cause of action, survived against the defendant's executor is settled by Patton v. Brady (184 U. S. 608, 22 S. Ct. 493, 46 L. Ed. 713). Hence rule 17 of this court is applicable, permitting the personal representative of the deceased party to come in voluntarily.

The taxes in dispute were assessed and collected under section 1000 of the revenue act of 1921 (42 Stat. 294). They were paid voluntarily, but, as the plaintiff now asserts, erroneously. Claims for refund having been rejected, this suit resulted. The
147 sole question it presents is the same as that discussed in Home Title Ins. Co. v. United States ((C. C. A.) 49 F. (2d) —), this day decided, namely, whether the plaintiff is to be deemed an insurance company within the meaning of section 246 of the revenue act of 1921 (42 Stat. 262). The facts in the two cases are, however, somewhat different.

The main difference is that Lawyers' Mortgage Company, unlike the plaintiff in the other case, issues no policies of title insurance. It was incorporated in 1893 under article 5 of the insurance law of the State of New York (Laws N. Y. 1892, c. 690), pertaining to title and credit guaranty corporations, and it is subject to supervision by the insurance department of the State, with the requirements of which it has always complied. Prior to amendment of its charter in 1913, its sole business was issuing policies of mortgage insurance; that is, policies guaranteeing payment of existing mortgages owned

by the persons applying for its policies. In that year the statute under which it was incorporated was amended to permit mortgage guaranty companies to invest their own funds in mortgages and to sell the same accompanied by the company's guaranty. (N. Y. Laws 1913, c. 215.) Plaintiff's charter was amended accordingly, and during the taxable years in question the main part of its business was done by making mortgage loans in its own name and selling them to investors, accompanied by its guaranty, and only a small percentage of its business was issuing policies guaranteeing mortgages it had never owned. Thus the bulk of its business was such as might lawfully be done by a corporation organized under the banking law of New York (Consol. Laws N. Y. c. 2), and subject to supervision by the State banking department rather than the insurance department.

Plaintiff's loans were made on application by prospective borrowers, and, when the loan was closed, the borrower received the face amount of his bond and mortgage less plaintiff's charges, consisting of disbursements, chiefly the cost of procuring title insurance from a title insurance company, and of a lending fee, or, on the renewal of a mortgage, an extension fee. Such lending fees and extension fees included plaintiff's charges for appraisals, and were at the prevailing rates charged by other lenders. In disposing of its mortgages, plaintiff either assigned the bond and mortgage in its entirety, accompanied by its regular policy of mortgage guaranty, or assigned fractional interests or participations in a specified mortgage, in which case it issued to the purchaser its "guaranteed first-mortgage certificate," which combined an assignment of a fractional interest in the specified bond and mortgage and a guaranty similar in terms to plaintiff's regular policy of guaranty. In either event plaintiff made no profit on the sale, but sold for the face amount of the mortgage. Its primary purpose in making such loans was not investment, but sale at face value, accompanied by its guaranty.

By the terms of its policy, which is the same whether or not plaintiff sells the mortgage to the holder of its policy, it guarantees to the holder payment of interest at a specified rate within five days after it becomes due under the mortgage, and payment of the principal as and when collected, but in any event within eighteen months after written demand by the policyholder, provided his demand is made after the principal has become due under the terms of the mortgage. By accepting the policy, the holder appoints plaintiff his agent to collect interest and principal as it falls due under the mortgage, authorizes plaintiffs to retain interest collected in excess of the guaranteed rate, usually one-half of 1 per cent, as the "premium" for its guaranty, and agrees that, upon payment by plaintiff of the principal of the mortgage after it has become due, the bond and mortgage are to be assigned to plaintiff.

Commencing with the year 1921, there was a marked increased in building activity in New York City, and a corresponding increase in

the demand for mortgage loans, especially building loans. During the taxable years in question plaintiff's income derived from lending fees and extension fees was nearly half of its total income, and was considerably greater than its "premium" income, and more than twice its "interest" income.

The appellant's contentions are, first, that plaintiff does no insurance whatever, because its policy of guaranty is not a contract of insurance; and, second, that, even if the guaranteeing of mortgages be deemed insurance, it was but incidental to dealing in investments, which constituted the great bulk of plaintiff's business.

It is to be noted that the first contention is as applicable to the guaranty of mortgages which plaintiff has never owned as to
148 those which it sells accompanied by its guaranty. In effect the argument denies the possibility of mortgage insurance, if the "insurer" promises unconditionally to pay the interest and principal upon specified dates whether or not they have been collected from the mortgagor. The argument is too verbal to persuade us. The risk of noncollection is assumed by plaintiff in return for the "premium" reserved out of interest collected. The business of assuming such risks we have held to be insurance for reasons more fully stated in Home Title Ins. Co. v. United States, supra.

The second contention is likewise not sustainable, and was also dealt with in the case last mentioned. Plaintiff made and sold mortgage loans not to make profit on the sales, for there was none, but to enable it to guarantee the mortgages. Its profits lay in its "premiums" and in its lending and extension fees. Such fees we regard as incidental to its business of insuring mortgages. It is true that during the years in question this item grew to enormous proportions, becoming substantially as large as the combined income from premiums and interest. Are we to say that this made plaintiff any less an insurance company? We think not. These incidental fees were the outgrowth of the genuine business of insurance and in earlier years had constituted but a small part of its income. Their tremendous increase in the years in question was during a period of great activity in building loans. Premiums also mounted, but not in like proportion, for they, being based upon interest, were extended throughout the term of the mortgage, while the incidental fees were collected in bulk when the loan was made. It would be possible to say that companies should shift in and out of the class of insurers according as such an incidental item of their income rises or falls. But, as the district judge pointed out, such a result would have disadvantages from the standpoint of administering the tax law, and is not a result likely to have been intended by Congress when the character of the taxpayer's business has not changed, and the only difference arises from the sudden flaring of what had previously been clearly an incident. Consequently, although the facts here presented are somewhat less favorable for the taxpayer than

they were in the Home Title Insurance Company case, the result should be the same, and the judgment is affirmed.

CHASE, Circuit Judge, dissents with opinion.

149 In United States Circuit Court of Appeals for the Second Circuit

No. 16—October term, 1930

Argued January 16, 1931. Decided June 1, 1931

LAWYERS' MORTGAGE COMPANY, PLAINTIFF-APPELLEE

v.

FRANK K. BOWERS, COLLECTOR OF INTERNAL REVENUE, defendant-appellant

Appeal from the District Court of the United States for the Southern District of New York

Before L. HAND, SWAN, and CHASE, Circuit Judges

Dissenting opinion

CHASE, Circuit Judge (dissenting):

In doing that portion of its business which it claims gives it the standing of an insurance company for purposes of taxation, the plaintiff uses some of the language of insurance and of bargain and sale to put into being what seems to me, at least, no more than the obligation of a borrower on collateral security toward its so-called purchasers of mortgages. It has painted a word picture that creates an illusion of insurance, but the language is so transparent that it should not be allowed to obscure the real obligations assumed.

What this plaintiff really does is to lend money, in the first instance, on the security of real-estate first mortgages which it approves and is paid by the borrower for approving. It then becomes necessary for it to tap the reservoir of money controlled by the investing public to replenish its funds for use for additional lending on first mortgages on real estate. To do this, it goes through the form of selling all, or a share only, of a mortgage it holds to some one who is willing to invest money at a rate of return one-half of 1 per cent less than the plaintiff receives on its mortgage. In this way it gets back the face amount of its mortgage in cash, often, if not always, more than it has withdrawn from its own funds to take the mortgage, as the fees charged its borrower have been deducted from the face of the loan it has made, and retains all its rights under

the mortgage it appears to sell, including, of course, the sole right to collect both principal and interest. It has merely subjected the mortgage to reach by the "purchaser" in the event only that the plaintiff ultimately fails to repay that "purchaser" as it has promised. There can be no such default by the plaintiff until the expiration of a period of grace after the due dates of the mortgage both as to principal and interest; that is, its own obligation is fixed in time by a reference to the due dates of the mortgage. But if it does not pay as it has agreed, it is as much in default if the mortgage has been fully paid and discharged as if it has not.

Although use is made of an elaborate verbal means to bring in the money the plaintiff uses in its business and it collects fees and "premiums" as the successive steps are taken both to place money on real-estate loans and to obtain money to be so placed, the insurance business, which my brothers see so clearly, appears to me to be only an investment business disguised as insurance. Because of its own high credit and the borrowing power resulting from that, the plaintiff can, and does, become a borrower itself to the extent of the full face value of the mortgage it has obtained in making its loan and at a lower rate of interest than its own borrower has to pay, and this, upon no additional security than that of the mortgage it holds.

Mere enlargement of business and the multiplication of such
150 transactions can neither serve to spread the risk nor result in insurance of any kind, unless it can be said that the credit of a large and frequent borrower who makes a business of lending the money borrowed is for that reason alone better than the credit of one whose transactions of that nature are comparatively small and few; and so, for some reason I cannot perceive, one who lends to the former gets some kind of insurance by volume. What one of the plaintiff's "purchasers" gets is the promise of the plaintiff to pay unconditionally and this absolute obligation, unrelated to any default by the mortgagor, accrues merely with the lapse of time. The financial responsibility of the plaintiff is fortified by the security of the mortgage. Whatever recognition of the rights of a purchaser of a mortgage are first written into the contract, the plaintiff calls a policy and gives to those from whom it obtains money to use in its business are all written out before the end. The result is that a policyholder has only the primary obligation of the plaintiff to repay the principal of the loan it has received; to pay the agreed rate of interest on it; and, by operation of law, the right to look to the collateral security of the mortgage if the plaintiff defaults.

The taxes the plaintiff has already paid were lawfully assessed and collected.

I would reverse the judgment and remand, with directions to enter judgment for the defendant.

151 In United States Circuit Court of Appeals, Second Circuit

LAWYERS MORTGAGE COMPANY, PLAINTIFF-APPELLEE

v.

FRANK K. BOWERS, AS COLLECTOR, ETC., DEFENDANT-APPELLANT

Judgment

Filed June 8, 1931

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be, and it hereby is, affirmed with interest and costs.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

WM. PARKIN, *Clerk.*

152 [File endorsement omitted.]

153 [Clerk's certificate to foregoing transcript omitted in printing.]

154 Supreme Court of the United States

Order allowing certiorari

Filed October 26, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] Enter. Atty. Gen. File No. 36169. U. S. Circuit Court of Appeals, Second Circuit. Term No. [illegible]. Frank Collis Bowers, as executor of the estate of Frank [illegible] Bowers, formerly United States collector, etc., petitioner, vs. Lawyers Mortgage Company. Petition for writ of certiorari and exhibit thereto. Filed September 5, 1931. File No. 36169.

U. S. GOVERNMENT PRINTING OFFICE

FILE COPY

No. 355

In the Supreme Court of the United States

October Term, 1931

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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. —

FRANK COLLIS BOWERS, AS EXECUTOR OF THE ESTATE of Frank K. Bowers, Formerly United States Collector of Internal Revenue, Deceased, petitioner

v.

LAWYERS MORTGAGE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

PETITION

The Solicitor General, on behalf of Frank Collis Bowers, as Executor of the Estate of Frank K. Bowers, formerly United States Collector of Internal Revenue, deceased, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in this case June 8, 1931 (R. 151), affirming the judgment of the District Court for the Southern District of New York (R. 10–11).

QUESTION PRESENTED

Whether the respondent, a corporation engaged in the business of making mortgage loans and thereafter selling such loans under its "policy of mortgage guaranty," was an "insurance company subject to the tax imposed by section * * * 246" of the Revenue Act of 1921, and therefore not taxable under Sections 230 and 1000 of that Act.

STATUTES INVOLVED

These are set forth in the Appendix, pp. 17–18, *infra*.

STATEMENT

The respondent, a New York corporation, voluntarily paid the capital-stock tax imposed upon domestic corporations by Section 1000 (a) (1) of the Revenue Act of 1921, p. 17, *infra*, for the fiscal years ending June 30, 1923, and June 30, 1924. (R. 20, 41–42.) Subsequently it filed claims for refund of such taxes on the ground that it was an "insurance company" and therefore liable for only the tax imposed by Section 246 of that Act. (R. 20, 21, 42, 75.) These claims were denied (R. 21, 43), whereupon the respondent brought this suit in the District Court (R. 3–6). A jury was waived in writing and the cause tried upon stipulated facts. (R. 17–32.)

The respondent is a corporation organized in 1893 under Article V of the Insurance Law of New York relating to title and credit guaranty cor-

porations. (Laws 1892, c. 690.) As such it has been, and now is, subject to supervision by the State Superintendent of Insurance, to whom it makes annual reports. (R. 18, 19, 39–40, 41.)

The respondent has never issued policies of title insurance, although authorized to do so. (R. 22, 44.) Its business was and is carried on as follows: It receives applications for loans secured by first mortgages on real estate. On receiving such an application it causes an appraisal of the security to be made. If the report of the appraisers is satisfactory the application is turned over to a title insurance company, which issues a report on the title and, after the loan is closed, delivers a policy of title insurance. Upon closing a loan the applicant executes a bond and mortgage to the respondent and in return receives the face amount of the loan less charges for the services rendered and for recording, and less a lending fee, which includes the appraisal charge and which constitutes part of the respondent's gross income. (R. 22–24, 44–46.) Thereafter the bonds and mortgages, or certificates of participation therein, are sold or assigned to investors, ostensibly at their face value. When a bond and mortgage are sold, respondent delivers to the investor an assignable "policy of mortgage guaranty." (R. 46–47; Exhibit T, R. 120–127.) In the case of the sale of a participation certificate (R. 47–48; Exhibit U, R. 128–132) there is incorporated in the certificate itself terms corresponding substantially with those in the "policy."

By the "policy," or participation certificate, the purchaser or investor appoints the respondent as his agent to collect the principal and interest on the bond and mortgage (by suit if necessary, but without expense to the purchaser), to keep the title guaranteed to the amount of the mortgage, to keep the mortgaged premises insured against fire, and to require the owner thereof to pay all taxes, assessments, water rates, and fire insurance premiums. The respondent guarantees payment of the principal as and when collected, but in any event within eighteen months after demand in writing by the purchaser after maturity, and payment of interest at a specified rate, which is usually one-half of one per centum less than the rate specified in the bond. This difference, called a "premium," is retained by respondent, and constitutes the consideration for the sale of the mortgage and its accompanying policy or the certificate. (R. 24–26, 120–132.)

In a few cases, constituting only a small percentage of its total business, the respondent issues similar policies to holders of outstanding mortgages not sold by the respondent. (R. 26–27, 48–49.)

The respondent does not make loans for its own investment primarily, but for the purpose of ultimate sale to the general public. In making assignments of bonds and mortgages or of fractional certificates, the respondent always enters into the guaranty described. (R. 28, 50.) The average

length of time between the making of loans and their subsequent transfer to investors is not shown. The interest earned in this intervening period is part of respondent's gross income. Upon renewals of loans extension fees are charged at the generally prevailing rates. (R. 29, 50.)

The sources and amounts of respondent's income in 1922 and 1923 were as follows (R. 29, 51; Exhibit M, R. 77):

Year	Fees (lending and extension)	Interest	Total fees and interest	Premiums
1922	$869,587.26	$372,795.12	$1,242,382.38	$619,986.38
1923	1,064,601.08	426,842.31	1,491,443.39	750,803.21

In conducting its business, the respondent did not segregate its assets, but used them indiscriminately in all its activities. It always kept on hand a sufficient quantity of its bonds and mortgages to maintain the guaranty fund supposedly required by Article V of the New York Insurance Law. (R. 31–32, 53.)

By the law of New York corporations organized under its banking statutes and subject to supervision by the State Banking Department may be authorized to do a mortgage guaranty business substantially like that of the respondent, and at least two companies thus organized and supervised have been and are now so engaged. (R. 29–30, 35, 51.)

The District Court held that the respondent was an "insurance company" within the meaning of Section 246 of the Revenue Act of 1921 and directed

judgment in favor of respondent. (R. 54.) Upon appeal to the Circuit Court of Appeals the judgment was affirmed, one judge dissenting. (R. 146–151.)

SPECIFICATION OF ERRORS TO BE URGED

1. The Circuit Court of Appeals erred in holding that the respondent was taxable as an "insurance company" under Section 246 of the Revenue Act of 1921.

2. The Circuit Court of Appeals erred in not holding that the respondent was taxable under Sections 230 and 1000 of the Revenue Act of 1921.

REASONS FOR GRANTING THE WRIT

1. The issue involved in the instant case is of unusual importance in the administration of the tax laws. All the Revenue Acts, beginning with the Act of 1921, make special provision for the taxation of insurance companies.[1] Although the instant case arises under the capital-stock tax provisions of the 1921 Act, which are now repealed,[2] the question presented, broadly speaking, is whether mortgage guaranty companies are taxable as insurance companies or as ordinary commercial corporations. So considered, the question is one which arises un-

[1] See Section 246 of the Revenue Act of 1921, c. 136, 42 Stat. 262; Section 246 of the Revenue Act of 1924, c. 234, 43 Stat. 290; Section 246 of the Revenue Act of 1926, c. 27, 44 Stat. 48; and Section 204 of the Revenue Act of 1928, c. 852, 45 Stat. 844.

[2] See Section 1200 (a) of the Revenue Act of 1926, c. 27, 44 Stat. 125.

der the income-tax provisions of the present law and will be constantly recurring in the absence of a decision by this Court. We believe that a decision by this Court in the instant case will relieve the lower Federal courts of a large amount of litigation.

The question presented in the instant case is now pending in 14 cases before the District Courts, involving an aggregate of $725,000 in taxes, and in 8 cases before the Board of Tax Appeals, involving an aggregate of $84,000 in taxes. The question is presented also in 182 claims for refund now under consideration by the Capital Stock and Income Tax Units of the Bureau of Internal Revenue, aggregating $955,000 in taxes. There are 177 similar cases before these units in which formal claims for refund have not yet been filed, in which cases the total amount of taxes involved is approximately $650,000.

2. In its broader aspects, the question involved arises in connection with the stamp tax laid upon "corporate securities."[3] Mortgage guaranty companies have contended that their participation certificates are not "corporate securities," but contracts of insurance, and hence not subject to the stamp tax. In *Mortgage Guarantee Co.* v. *Welch*, 38 F. (2d) 184 (C. C. A. 9th), certiorari denied, 281 U. S. 759, this contention was overruled, but a con-

[3] See Section 1107, Schedule A (1) of the Revenue Act of 1921, c. 136, 42 Stat. 303; Section 807, Schedule A (1) of the Revenue Act of 1924, c. 234, 43 Stat. 333; Section 807, Schedule A (1) of the Revenue Act of 1926, c. 27, 44 Stat. 101.

siderable number of similar suits are now pending. It seems clear that the decision in the instant case has an important bearing on these cases.

3. Although there is no conflict of decisions in the Circuit Courts of Appeals, considerable diversity of judicial opinion exists. The issue involved in the instant case has been passed upon in *Home Title Ins. Co.* v. *United States*, 41 F. (2d) 793 (E. D. N. Y.), 50 F. (2d) 107 (C. C. A. 2d), in which case the Government is filing a petition for certiorari simultaneously herewith; *Louisville Title Co.* v. *Lucas*, 27 F. (2d) 413 (W. D. Ky.), and *Title Guarantee & Trust Co.* v. *United States*, 49 F. (2d) 641 (S. D. Cal.). In all these cases the District Courts held mortgage guarantee companies doing business in substantially the same manner as the respondent to be taxable as ordinary commercial corporations and not as insurance companies.

4. We believe that the Circuit Court of Appeals misinterpreted the scope and effect of the decision of this Court in *United States* v. *Loan & Bldg. Co.*, 278 U. S. 55, and failed to realize the application to the instant case of the decisions of this Court in *Burk-Waggoner Oil Assn.* v. *Hopkins*, 269 U. S. 110, and *Weiss* v. *Wiener*, 279 U. S. 333.

Wherefore, it is respectfully submitted that the petition should be granted.

THOMAS D. THACHER,
Solicitor General.

SEPTEMBER, 1931.

BRIEF IN SUPPORT OF THE PETITION

OPINIONS BELOW

The opinion of the District Court (R. 33–38) is reported in 34 F. (2d) 504. The opinion of the Circuit Court of Appeals (R. 146–151) is reported in 50 F. (2d) 104.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 8, 1931. (R. 151.) Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED, STATUTES INVOLVED, ETC.

A statement of the question presented, specification of errors to be urged, and a statement of the case will be found in the petition. The statutes involved are set out in the Appendix, pp. 17–18, *infra*.

ARGUMENT

By Section 246 of the Revenue Act of 1921, pp. 17–18, *infra*, Congress provided for the taxation of "insurance companies" on a more favorable basis than that applied to commercial corporations generally. Under familiar rules the limits of such an exception are narrowly construed, and classifi-

cation within those limits will be accorded only to companies clearly entitled thereto.

Although Congress did not undertake to define "insurance companies" it indicated the kind of corporation which should be held taxable as such by defining, in subdivision (b) (1) of Section 246, pp. 17–18, *infra*, the gross income of an insurance company as the "gross amount, earned * * * from investment income and from underwriting income." It is common knowledge that a true insurance company has very little, if any, income which does not fall within either or both of these classes. But in the case of the respondent approximately half its income was derived from *fees for making loans*. (R. 51.) Apparently this income escapes taxation altogether if respondent is held to be an "insurance company" within the meaning of Section 246.

An exemption from taxation is not to be presumed or imputed to Congress in the absence of language admitting of no other interpretation. A substantial part of respondent's income did not arise from the usual and ordinary business of an insurance company, and therefore we submit that the respondent was not entitled to be taxed as an insurance company. As stated by the court in *Title Guarantee & Trust Co.* v. *United States*, 49 F. (2d) 641, 643 (S. D. Cal.), *supra*, in construing Section 246:

> It can not be doubted that Congress, in making an exceptional class of insurance

corporations, intended that the corporations which were so favored in the payment of income tax should belong strictly to the class assigned to them. The corporation here had the option of limiting its business operations and functions to those which are the well-known attributes of insurance writing, but it can not combine with insurance work a variety of other classes of profitable business and claim the exempt status which will result in its being relieved of a considerable tax which it would have to pay were the business other than insurance conducted separately.

Even assuming that the respondent's "Policy of Mortgage Guarantee" amounted to a "contract of insurance," nevertheless we submit that the respondent was not an "insurance company" within the meaning of Section 246. Upon the assumption stated, it performed some insurance business, but its primary business was that of selling mortgages, to which the promises of guaranty were merely incidental or ancillary. The Circuit Court of Appeals reached the opposite conclusion upon the ground that, unlike investment companies generally, respondent's profits did not come from the spread in the purchase and sales price of the bonds and mortgages it sold; that accordingly respondent made the loans and sold the mortgages only for the purpose of creating an opportunity to insure their payment, and that the loan and subsequent sale were merely incidental to the guaranty.

But the fact that the respondent received its profit in the form of periodic payments called "premiums," did not make its business that of insurance rather than that of investment broker. *State* v. *The Federal Investment Co.*, 48 Minn. 110, 111. Moreover, we believe that in essence the respondent did get its profit from the spread in purchase and sale prices. It sold the bonds and mortgages and certificates for more than it paid for them by reducing the amount of interest received by the investor. The practical result to the respondent in the way of profit on the sale of the mortgages was the same as if the sale had been at a premium.

The Government contends that the guaranty was merely one of the terms or conditions of the contract of sale. The fact that the guaranty was, or resembled, a contract of insurance did not change the legal and primary character of the transaction as a sale of the bond and mortgage. A contract of hiring is not changed to one of insurance merely because the employer deducts a portion of the employee's wages and in return agrees to pay the employee for his labor even if the goods upon which the labor is expended are destroyed while in the latter's custody. *Stern* v. *Rosenthal*, 71 Misc. Rep. 422. A business of inspecting and certifying the sanitary condition of buildings is not changed to one of insurance because the company also intends to insure against loss occasioned by bursting pipes, leaking plumbing, etc. *People ex*

rel. Woodward v. *Rosendale,* 142 N. Y. 126. A contract of employment is not changed to one of insurance merely because the employer agrees to protect workmen from injuries by strikers. *Hansen* v. *Dodwell Dock & Warehouse Co.,* 100 Wash. 46. See also *Cole* v. *Haven,* 7 N. W. (Iowa, 1880) 383; *Evans & Tate* v. *Premier Refining Company,* 31 Ga. App. 303. We believe that what respondent was doing was selling mortgages, and that the guaranty was merely an incident of such transaction of sale.

Insurance companies, as commonly known, assume risks to which others are exposed; they do not create risks to be thereafter insured. In the instant case the respondent bears the risk both before and after the issuance of its "policy of mortgage guaranty." The party "insured" never has it. The insurance which the respondent asserts it provides does not involve the shifting of risks which is present in insurance business as commonly known.

The Government contends further that the respondent's promise of guaranty is not a contract of insurance but a contract of guaranty, similar to that of a guarantor of a promissory note. Without attempting to enumerate all differing incidents of the two, it is true generally that a contract of insurance is an independent and direct, personal undertaking, collateral to no other contract, whereas in a contract of guaranty the covenant is collateral

to another contract and dependent thereon. The respondent's undertaking upon the sale of its mortgages is not independent of but is collateral to the mortgagor's obligation. Its liability to pay under the "policy" is dependent upon the terms of the loan both as to principal and interest; it "guarantees" "payment of interest * * * under the terms of said bond and mortgage," and "payment of the principal sum * * * under the terms of the said bond and mortgage." (R. 120.) Accordingly, we believe that respondent's covenant is a pure guaranty and not a contract of insurance.

The conclusion of the Circuit Court of Appeals that the respondent was an insurance company within the meaning of Section 246 was apparently predicated partly upon the decision of this Court in *United States* v. *Loan & Bldg. Co.*, 278 U. S. 55, and the fact that respondent was organized and operated under the Insurance Law of New York.[4] It is true that the corporation involved in the *Loan & Bldg. Co.* case was held to be a "building and loan association" partly because it was organized as such under the State laws, but the decision in that case went off on the ground that the taxpayer was commonly known as a building and loan asso-

[4] This argument was advanced by the court in *Home Title Ins. Co.* v. *United States*, 50 F. (2d) 107, *supra*, decided the same day as the instant case, and involving a mortgage guaranty company organized and doing business substantially in the same manner as the respondent.

ciation (p. 58). Here the situation is radically different, since companies of respondent's type are not commonly recognized as insurance companies. The respondent did not even attempt to pose as such before the public. Its 1925 report to the Superintendent of Insurance and its advertising by means of so-called "radio talks" show unmistakably that it was holding itself out and was commonly known as an investment company. (R. 78–80.)

Furthermore, the taxpayer in the *Loan & Bldg. Co.* case could operate only under the Ohio building and loan laws, whereas here the respondent could have been organized under the *banking laws* of New York and have pursued substantially the same business. (R. 29–30.) If the form of organization under the New York laws is held to be controlling, the result would be that respondent would be taxable under Section 246, while some of its competitors would be taxable on a more onerous basis as ordinary commercial corporations. We do not believe that the *Loan & Bldg. Co.* case was intended to limit the doctrine of cases like *Burk-Waggoner Oil Assn.* v. *Hopkins,* 269 U. S. 110, 114, and *Weiss* v. *Wiener,* 279 U. S. 333, 337, which hold that the power of the Congress to classify persons or property for purposes of taxation is not limited by their treatment under local law, nor is its power to apply its own tests and criteria in determining taxable status. Clearly Section 246 was not intended

to embrace every organization a State might for reasons of its own be content to supervise under its insurance laws.

CONCLUSION

We submit that the decision of the Circuit Court of Appeals is erroneous. The question presented is one of general importance in the administration of the laws and is raised in a large number of cases pending in the courts and the Bureau of Internal Revenue. Several District Courts have reached a conclusion contrary to that of the courts below. We respectfully submit that the petition should be granted.

THOMAS D. THACHER,
Solicitor General.
G. A. YOUNGQUIST,
Assistant Attorney General.
J. LOUIS MONARCH,
HAYNER N. LARSON,
Special Assistants to the Attorney General.
PAUL D. MILLER,
Attorney.

SEPTEMBER, 1931.

APPENDIX

Revenue Act of 1921, c. 136, 42 Stat. 227, 252, 262, 294.

CAPITAL STOCK TAX

SEC. 1000 (a) That on and after July 1, 1922, in lieu of the tax imposed by section 1000 of the Revenue Act of 1918—

(1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to $1 for each $1,000 of so much of the fair average value of its capital stock for the preceding year ending June 30 as is in excess of $5,000. In estimating the value of capital stock the surplus and undivided profits shall be included;

* * * * *

(b) The taxes imposed by this section shall not apply * * * to any insurance company subject to the tax imposed by section * * * 246.

TAXES ON INSURANCE COMPANIES

SEC. 246. (a) That, in lieu of the taxes imposed by sections 230 and 1000, there shall be levied, collected and paid for the calendar year 1922, and for each taxable year thereafter, upon the net income of every insurance company (other than a life or mutual insurance company) a tax as follows:

(1) In the case of such a domestic insurance company the same percentage of its net income as is imposed upon other corporations by section 230;

* * * * *

(b) In the case of an insurance company subject to the tax imposed by this section—

(1) The term "gross income" means the combined gross amount, earned during the

taxable year, from investment income and from underwriting income as provided in this subdivision, computed on the basis of the underwriting and investment exhibit of the annual statement approved by the National Convention of Insurance Commissioners;

(2) The term "net income" means the gross income as defined in paragraph (1) of this subdivision less the deductions allowed by section 247;

(3) The term "investment income" means the gross amount of income earned during the taxable year from interest, dividends and rents, computed as follows:

To all interest, dividends and rents received during the taxable year, add interest, dividends and rents due and accrued at the end of the taxable year, and deduct all interest, dividends and rents due and accrued at the end of the preceding taxable year;

(4) The term "underwriting income" means the premiums earned on insurance contracts during the taxable year less losses incurred and expenses incurred;

TAX ON CORPORATIONS

SEC. 230. That, in lieu of the tax imposed by section 230 of the Revenue Act of 1918, there shall be levied, collected, and paid for each taxable year upon the net income of every corporation a tax at the following rates:

(a) For the calendar year 1921, 10 per centum of the amount of the net income in excess of the credits provided in section 236; and

(b) For each calendar year thereafter, 12½ per centum of such excess amount.

U. S. GOVERNMENT PRINTING OFFICE: 1931

FILE COPY

No. 355

In the Supreme Court of the United States

OCTOBER TERM, 1931

FRANK COLLIS BOWERS, AS EXECUTOR OF THE ESTATE OF FRANK K. BOWLES, FORMERLY UNITED STATES COLLECTOR, ETC., DECEASED, PETITIONER

v.

LAWYERS MORTGAGE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 355

FRANK COLLIS BOWERS, AS EXECUTOR OF THE ESTATE of Frank K. Bowers, formerly United States Collector, Etc., Deceased, petitioner

v.

LAWYERS MORTGAGE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the District Court (R. 15–18) is reported in 34 F. (2d) 504. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 68–73) is reported in 50 F. (2d) 104.

JURISDICTION

The judgment sought to be reviewed was entered June 8, 1931. (R. 74.) Petition for certiorari was

filed on September 5, 1931, and the writ was granted on October 26, 1931. (R. 94.) The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether Section 1000 (b) of the Revenue Act of 1921, which exempted "any insurance company subject to the tax imposed by section * * * 246" from the capital stock tax imposed by Section 1000 (a), applied to the respondent, a corporation engaged in the business of making mortgage loans and thereafter selling such loans with its "policies of mortgage guaranty."

STATUTES AND REGULATIONS INVOLVED

These will be found in Appendices A to C (*infra*, pp. 42–56).

STATEMENT

The respondent, a New York corporation, on July 29, 1922, voluntarily filed a return for the capital stock tax for the period from July 1, 1922, to June 30, 1923, and on July 27, 1923, voluntarily filed a capital stock tax return for the period from July 1, 1923, to June 30, 1924. On November 3, 1922, the respondent voluntarily paid the tax of $10,147, shown on the first return; and on September 4, 1923, it voluntarily paid the tax of $10,731, shown on the second return. In each of these returns the respondent inserted under the

heading "Nature of business in detail" substantially the following words: "Guaranteed First Mortgages secured by New York Real Estate." (R. 18–20 and Exhibits I and K.)

On or about March 15, 1922, it had filed a consolidated income tax return for the calendar year 1921, for itself and its three subsidiary companies, the Nassau-Maiden Lane Loan Building Corporation, Liberty Brokerage Company, and Elemco Realty Company; and on or about March 14, 1923, it filed a similar return for the year 1922. In each of these it inserted under the heading "Kind of business" the words "Guaranteed Mortgages, etc.," and in each of these it included in its return of gross income its lending and extension fees (hereinafter explained) and capital gains and losses, which corporations generally (as distinguished from insurance companies) were required to report under the Revenue Act of 1921. (R. 20 and Exhibits N and O.)

In none of these four returns did the respondent assert that it was an insurance company.

On November 14, 1923, it filed claims for refund of the capital stock taxes on the ground that it was an insurance company and consequently was exempt from the capital stock taxes paid. (R. 19–20, and Exhibits J and L.) The Commissioner of Internal Revenue rejected the claims and the respondent duly brought this action in the District

Court against the Collector of Internal Revenue[1] to recover the capital stock taxes paid. (R. 2–3.) Written stipulation was filed waiving a jury. (R. 1.) The District Judge found the facts to be as stipulated by the parties and entered judgment against the Collector for the full amount claimed. (R. 18–26, 4.) The Circuit Court of Appeals, with Judge Chase dissenting, affirmed the judgment. (R. 68–74.)

The findings of fact may be epitomized as follows:

The respondent is a corporation duly incorporated as the "Lawyers Mortgage Insurance Company" in 1893, under Article V of the insurance law of the State of New York (Laws of 1892, ch. 690, p. 51, *infra*), pertaining to title and credit guaranty corporations. Its certificate of incorporation was filed in the office of the Superintendent of Insurance of the State of New York. (R. 18–19 and Exhibit A.) By order of the Supreme Court of New York entered October 3, 1903, the name of the respondent was duly changed to "Lawyers Mortgage Company" (R. 18), and on January 10, 1905, the respondent amended the statement of its purposes as contained in its original certificate of incorporation (R. 18–19 and Exhibit B). On December 18, 1913, this certificate, with the consent of the Superintendent of Insurance, was further amended to include in the statement of

[1] The petitioner here is the executor of the estate of the Collector, the Collector having died after appeal was taken to the Circuit Court of Appeals and the executor having come in voluntarily. (R. 69.)

purposes and powers of the company all of those of a title guaranty corporation organized under Article V, section 170, paragraph 1, of the insurance law, as amended by chapter 215 of the Laws of 1913 (pp. 52–53, *infra*) (R. 19 and Exhibit C). Thus it first acquired the right to make and sell loans on mortgages. The respondent has at all times since the date of its incorporation been subject to examination by and supervision of the Superintendent of Insurance of the State of New York, and has been subject to the provisions of the insurance law of that State applicable to so-called title and credit guaranty corporations organized thereunder. It has been required to file and has filed annually with the Superintendent, on forms approved by him, statements of its condition as of December 31 of each year. (R. 18–19 and Exhibits D and E.)

The respondent has never engaged in the business of insuring titles to real estate, although authorized to do so. (R. 20.) Its business is carried on as follows: It receives applications for loans secured by first mortgages on real estate. On receiving such an application it causes an appraisal of the security to be made. If the report of the appraisers is satisfactory, the application is turned over to a title insurance company, which issues a report on the title and furnishes a survey, and, after the loan is closed, delivers a policy of title insurance. Upon closing a loan the applicant exe-

cutes a bond and mortgage to the respondent (Exhibit S) and in return receives the face amount of the bond less charges for the title policy and survey, disbursements, and mortgage recording tax, and less a lending fee, at the prevailing rate, which includes the appraisal charge and which constitutes part of the respondent's gross income. (R. 20–23.) Thereafter the bonds and mortgages, or certificates of participation therein, are sold to investors. When a bond and mortgage are sold, they are assigned and respondent delivers to the investor an assignable "policy of mortgage guaranty." (R. 22 and Exhibit T, R. 57–61.) In the case of the sale of a participation certificate (R. 22 and Exhibit U, R. 61–63) there is incorporated in the certificate itself terms corresponding substantially to those in the "policy." The participation certificate is assignable by endorsement, but only when the assignment is registered on the books of the company.

By the "policy" or the participation certificate, the purchaser or investor appoints the respondent his agent to collect the principal and interest on the bond (by suit if necessary, but without expense to the purchaser), to keep the title guaranteed to the amount of the mortgage, to keep the mortgaged premises insured against fire, and to require the owner thereof to pay all taxes, assessments, water rates, and fire insurance premiums. By the policy or the certificate the respondent guarantees payment of the principal as and when collected, but in any event within eighteen months

after demand in writing by the purchaser after maturity, and also guarantees the payment of interest at a specified rate, which is usually one-half of one per centum less than the rate specified in the bond. This difference, called a "premium," is retained by respondent from the interest collected from the mortgagor. (R. 22.)

In some cases, constituting only a small percentage of its total business, the respondent issues similar policies to holders of outstanding mortgages not sold by the respondent. (R. 22–23.)

The respondent does not make loans for its own investment primarily, but for the purpose of ultimate sale to the general public. In making assignments of bonds and mortgages or of fractional certificates, the respondent always enters into the guaranty described. (R. 23.) The average length of time between the making of loans and their subsequent transfer to investors is not shown. The interest earned in this intervening period is part of respondent's gross income. Upon renewals of loans extension fees are charged at the generally prevailing rates. (R. 23–24.)

The sources and amounts of respondent's income in 1922 and 1923 were as follows (R. 24 and Exhibit M, R. 36):

Year	Fees (lending and extension)	Interest	Total fees and interest	Premiums
1922	$869, 587. 26	$372, 795. 12	$1, 242, 382. 38	$619, 986. 38
1923	1, 064, 601. 08	426, 842. 31	1, 491, 443. 39	795, 803. 21

In conducting its business the respondent did not segregate its assets, but used them indiscriminately in all its activities. It always kept on hand a sufficient quantity of bonds and mortgages to maintain the guaranty fund supposedly required by Article V of the New York insurance law. (R. 25.)

By the law of New York, corporations organized under its banking statutes and subject to supervision by the State Banking Department may make mortgage loans and sell bonds and mortgages and participations therein, with their guaranty, under the same general method of doing business as that of respondent; and at least two companies thus organized and supervised have been and are now so engaged. (R. 16, 24.)

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in not holding that the respondent was taxable under Section 1000 of the Revenue Act of 1921.

SUMMARY OF ARGUMENT

Section 1000(a)(1) of the Revenue Act of 1921 provided that every domestic corporation shall pay annually the special excise (capital stock) tax with respect to carrying on or doing business which was levied on the respondent in this case. The respondent contends, and the courts below held, that it was not subject to this kind of a tax because it was an "insurance company subject to the tax imposed

by section * * * 246" within the meaning of paragraph (b) of Section 1000, which provided that the tax imposed by this section should not apply to any such insurance company. The sole question is whether it was such an insurance company.

The statute nowhere defined the words "insurance company." Section 246 imposed "in lieu of the tax imposed by sections 230 [the income tax imposed on corporations generally] and 1000" a tax upon the "net income of every insurance company (other than a life or mutual insurance company)." Subsequent provisions of Section 246 provided that the gross income for corporations taxed under it should include only underwriting income and investment income. Investment income included only interest, dividends, and rents. Before the passage of the Revenue Act of 1921, insurance companies were subject to the same income tax as other corporations. As there is evidence that by Section 246 Congress did not intend to lower the taxes of any company, this section should not be construed to include in the term " insurance company" a company which derives a substantial portion of its income from a distinctive line of business other than that of insurance, as that word is commonly used. Neither the language of the Act nor its legislative history indicates that Congress meant to classify as insurance companies those corporations which are ordinarily known as "mortgage companies" or "investment companies."

The respondent should be classified as an investment company and not as an insurance company. It designated its business as that of "guaranteed mortgages" in its tax returns originally, and advertised that its business was to supply conservative investors with guaranteed mortgages. It lent money in the first instance on the security of real estate mortgages which it approved and was paid by the borrowers for approving. It then tapped the reservoir of money controlled by the investing public to replenish its funds for use for additional lending on mortgages. Even if it is possible to call the contracts made by the respondent "insurance," they were much more than insurance, and it is more natural to consider the whole transaction a part of the investment business. The contracts do not fall within the usual definitions of insurance, but are more analogous to the undertakings of *del credere* agents.

Moreover, the lending fees and extension fees paid by the mortgagors constituted the largest item in the respondent's gross income during the years in question. Together they were almost one-half of its gross income. The business of making such loans was obviously not insurance, and we submit that it cannot be regarded as incidental to the business of guaranteeing mortgages.

The fact that the respondent was organized under the insurance laws of New York and was sub-

ject to the supervision of the insurance superintendent is not conclusive. Under the banking laws of New York corporations could be and were organized to carry on substantially the same business as that carried on by the respondent. It seems reasonable to suppose that the Congress intended that the provisions of the tax law should have uniformity of operation and that it had its own criteria as to what constituted insurance companies, irrespective of local law. The respondent was not designated as an insurance company by the New York law, by itself in its corporate name, in its tax returns, or in its advertisements. *United States* v. *Cambridge Loan & Building Co.*, 278 U. S. 55, appears to be distinguishable from the instant case.

ARGUMENT

Section 1000 (a) (1) of the Revenue Act of 1921 (p. 42, *infra*) provides that "every domestic corporation" should pay annually the special excise (capital stock) tax with respect to carrying on or doing business which was levied on the respondent in this case. There is no question as to the proper amount of the taxes if the respondent was subject to any capital stock tax at all. The respondent contends, and the courts below held, that it was not subject to this kind of tax because it was an "insurance company subject to the tax imposed by section * * * 246," within the meaning of paragraph (b) of Section 1000, which provided

that the taxes imposed by this section should not apply to any such insurance company.[2]

The sole question is whether the respondent during the years in question was an "insurance company subject to the tax imposed by section * * * 246." We contend it was not such a company.

I

THE STATUTE SHOULD NOT BE CONSTRUED TO EXEMPT ANY CORPORATION FROM THE CAPITAL STOCK TAX IF IT DERIVES A SUBSTANTIAL PORTION OF ITS GROSS INCOME FROM A DISTINCTIVE LINE OF BUSINESS OTHER THAN INSURANCE, AS THAT WORD IS COMMONLY USED

The statute nowhere expressly defined the words "insurance company" occurring in Section 1000(b). The definitions in Section 2 of the Revenue Act of 1921 included the following: "The term 'corporation' includes associations, joint-stock companies, and insurance companies." It is not disputed that Section 1000(a) (1), if standing alone, would impose the tax. The burden is upon the respondent to show that it fell within the express exemption of Section 100 (a)—i. e., that it was an "insurance company subject to the tax imposed by section * * * 246."

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[2] Section 1000(b) provided:

"The taxes imposed by this section shall not apply * * * to any insurance company subject to the tax imposed by section 243 or 246."

Section 243 imposed a tax "upon every life insurance company," and consequently has no application to the instant case.

Section 246 (*infra*, p. 43) provided:

> (a) That, in lieu of the taxes imposed by sections 230 and 1000, there shall be levied, collected and paid for the calendar year 1922, and for each taxable year thereafter, upon the net income of every insurance company (other than a life or mutual insurance company) a tax as follows:
>
> (1) In the case of such a domestic insurance company the same percentage of its net income as is imposed upon other corporations by section 230.

Although it might be argued that this language was applicable to any company (other than a life or mutual insurance company) which does *any insurance business*, neither of the courts below construed the language so broadly, and we do not understand that the respondent's contention goes as far as this. Anyway, a consideration of the general purpose of the Act, and particularly of the subsequent provisions of Section 246 itself, makes it clear that this can not be the correct construction.

Under the 1921 Act, most corporations were required to pay not only the capital stock tax but also the tax on net income imposed by Section 230. Under Section 230 of the 1918 Act, insurance companies were subject to the same tax as other corporations. In computing the tax under Section 230 of both Acts, corporations subject to it were required to include in their gross income—

> gains, profits, and income derived * * * from * * * trades, businesses, com-

> merce, or sales, or dealings in property * * * also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.[3]

In contrast with that broad definition of gross income, Section 246 provided:

> (b) In the case of an insurance company subject to the tax imposed by this section—
>
> (1) The term "gross income" means the combined gross amount, earned during the taxable year, from investment income and from underwriting income as provided in this subdivision, computed on the basis of the underwriting and investment exhibit of the annual statement approved by the National Convention of Insurance Commissioners.

This does not include many kinds of income which were to be included in the gross income of other corporations. Section 247 expressly provided for the deductions of certain kinds of income. The disposition of Congress has been to extend the income tax about as far as it can to all species of income. See *Heiner* v. *Colonial Trust Co.*, 275 U. S. 232, 235. Apparently there was no design

[3] Section 213, from which the above is quoted, provided that gross income did not include certain specified items, but these need not be considered, as some of them related to kinds of income which an insurance company would never receive, and the rest of them, we believe, were all specifically made deductible, in the case of insurance companies, by Section 247.

to exempt any corporation from anything which was considered as income under Section 213 and which was not made deductible by Section 247;[4] and it seems obvious that the reason why insurance companies taxed under Section 246 were required to report only investment income and underwriting income was because it was contemplated that Section 246 should apply only to corporations substantially all of whose income arose from underwriting or was income on investments.[5] There is no indi-

[4] Except capital gains. It is clear that insurance companies taxable under Section 246 were not required to include such gains. See Art. 692 of Regulations 62, promulgated under the Revenue Act of 1921, *infra*, pp. 48–49. Neither the Act itself nor its legislative history indicates why capital gains were excluded from the income of insurance companies. We understand that the reason why sales of capital assets were not to be included in computing the income tax was that there was a falling market at the time when this matter was considered and it was believed that insurance companies would take losses for tax purposes if sales of capital assets were included. No change was made in the law in regard to this matter until the Revenue Act of 1928, Section 204 (b) (1) (B) of which did provide for the taxation of capital gains. An examination of the 1920 gross income of 50 casualty and miscellaneous insurance companies picked at random from Best's Insurance Reports (Casualty and Miscellaneous Insurance Companies, Eighth Annual Edition) reveals that of the total income of such companies 93.82% was derived from underwriting income and 5.04% from investment income, while only 1.14% was from profits on investments and other miscellaneous sources.

[5] Section 246(b)(3) provided: "The term 'investment income' means the gross amount of income earned during the taxable year from interest, dividends, and rents, * * *." It is consequently clear that "investment income" is not meant to include profits from sales of investments or on placing loans.

cation in the statute that a corporation deriving a substantial amount of income from a business other than underwriting should be treated as "an insurance company" merely because it did some business which might be characterized as insurance. These considerations make it evident that the words "insurance company" were intended to designate only the kinds of corporation which are commonly thought of as insurance companies—i. e., those whose activities are confined to various recognized forms of underwriting and matters normally incidental thereto.

Further support for this view is found in the detailed provisions of Section 246 for computing "underwriting income," which were designed to confine such income to premiums *earned* during the taxable year less losses and expenses incurred. (See p. 44, *infra*.)

In regard to this item the Act provided:

> (5) The term "premiums earned on insurance contracts during the taxable year" means an amount computed as follows:
>
> From the amount of gross premiums written on insurance contracts during the taxable year deduct return premiums and premiums paid for reinsurance. To the result so obtained add unearned premiums on outstanding business at the end of the preceding taxable year and deduct unearned premiums on outstanding business at the end of the taxable year; * * *

What part, if any, of the interest which is to be deducted over a period of three years or more under the terms of the "policies of mortgage guaranty" would be earned during any year? And what would constitute "gross premiums *written*" during the year? Obviously these conceptions do not fit the items which the respondent designates "premiums."

Nor do we find any thing in the legislative history of the Act indicating that Congress meant to classify as insurance companies those corporations which are ordinarily known as "mortgage companies" or "investment companies."[6]

Prior to the passage of the Act of 1921 insurance companies were subject to all of the taxes imposed on corporations generally.[7] From the legislative history of the Act it appears that one purpose, perhaps the primary purpose, of inserting special provisions for taxing insurance companies in the Act of 1921 was to clarify the situation and avoid the uncertainty and litigation which had arisen in re-

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[6] In Appendix D, pp. 57–60, we have copied all of the extracts from committee reports which seem to bear upon the matter, except those mentioned on p. 18, *infra*.

[7] For provisions regarding income taxes see Section 10, Revenue Act of 1916, c. 463, 39 Stat. 756, 765, as amended by Section 1206 (1), Title XII, Act of March 3, 1917, c. 159, 39 Stat. 1000; Section 230 (a), Revenue Act of 1918, c. 18, 40 Stat. 1057. For provisions regarding capital stock taxes see Section 407, Revenue Act of 1916, c. 463, 39 Stat. 756, 789–790; Section 1000, Revenue Act of 1918, c. 18, 40 Stat. 1057, 1126.

spect of insurance companies under the previous Acts.[8] The report of the Committee on Ways and Means on the Revenue Bill of 1921 gives an itemized estimate as to the changes in annual receipts of revenue under the proposed law. Although it is quite obvious that the construction of the Act for which the respondent contends would result in substantially lowering the receipts from insurance companies (i. e., if that term should be held to include companies like the respondent), no such change in revenue is suggested in that report. (See Report No. 350, 67th Cong., 1st Sess., pp. 3–4.) And there is also positive evidence that Congress was determined that the change in the method of taxing stock insurance companies other than life insurance companies should in no case result in reducing the taxes paid by such companies. As first introduced in the House, the Revenue Bill of 1921 (H. R. 8245) provided a new method of taxation for life insurance companies only. Sections 246 and 247 were not contained in the bill as it passed the House but were added by Senate Amendment No. 32. Mr. Smoot, Chairman of the Senate Finance Committee, reported this amendment. In the debate upon it the following colloquy occurred (See Cong. Record, 67th Congress, 1st Sess., Part 7, pp. 7158–7159):

> Mr. KING. Mr. President, may I ask my colleague whether, in the examination of

[8] See House Report No. 350, 67th Cong., 1st Sess., *infra*, p. 57.

> these proposed amendments, it has been accurately determined that no deductions or allowances will be made to insurance companies to which they are not entitled, and that no exemptions or extensions of favors will be granted by this legislation?
>
> Mr. SMOOT. There is no doubt of it; and I want to say to my colleague that when this amendment is agreed to, outside of the mutual companies, every insurance company will pay to the Government of the United States a higher tax than it pays to-day.

If companies like the respondent are insurance companies, a large part of their income was exempted from the income tax by this very amendment, and the Senate, at least, labored under a grave misapprehension as to the effect of the Act which it passed.

Moreover, none of the later Revenue Acts requires insurance companies to return as gross income anything except underwriting income and investment income (except that the Revenue Act of 1928 does require the inclusion of capital gains).[9] Consequently if the decision below is affirmed, it would seem that even under the present Revenue Act, as well under the 1921 Act and all subsequent Acts, many companies will escape taxation on a substantial part of their income. It is incon-

[9] See Section 246 of the Revenue Act of 1924, c. 234, 43 Stat. 290; Section 246 of the Revenue Act of 1926, c. 27, 44 Stat. 48; and Section 204 of the Revenue Act of 1928, c. 852, 45 Stat. 844.

ceivable that Congress intended to create such a situation. Unless the language of the statutes clearly demands it—and we submit it does not—they should not be so construed. Cf. *Railroad Co.* v. *Commissioners,* 103 U. S. 1; *Bank of Commerce* v. *Tennessee,* 161 U. S. 134, 146; *Heiner* v. *Colonial Trust Co.,* 275 U. S. 232, 235, *supra.*

The question involved is also closely related to that which arises in connection with the stamp tax laid upon corporate securities.[10] Mortgage guaranty companies have contended that their participation certificates are not "corporate securities" but contracts of insurance, and hence not subject to the stamp tax. In *Mortgage Guarantee Co.* v. *Welch,* 38 F. (2d) 184 (C. C. A. 9th), certiorari denied, 281 U. S. 759, this contention was overruled, but a considerable number of similar suits are now pending. The decision in the instant case may well have an important bearing on these cases.

The provisions of Section 246 of the 1921 Act are in marked contrast with the explicit provisions of Title XI of the Revenue Act of 1918, levying stamp taxes on "mortgage guarantee policies." Paragraph 2 of Schedule A of this title imposed a tax *inter alia*—

> On all bonds executed for indemnifying any person who shall have become bound or

[10] See Section 1107, Schedule A (1) of the Revenue Act of 1921, c. 136, 42 Stat. 303; Section 807, Schedule A (1) of the Revenue Act of 1924, c. 234, 43 Stat. 333; Section 807, Schedule A (1) of the Revenue Act of 1926, c. 27, 44 Stat. 101.

engaged as surety, and on all bonds executed for the due execution or performance of any contract, obligation, or requirement, or the duties of any office or position, and to account for money received by virtue thereof, and on all policies of guaranty and fidelity insurance, including policies guaranteeing titles to real estate and mortgage guarantee policies, and on all other bonds of any description, made, issued, or executed, not otherwise provided for in this schedule, except such as may be required in legal proceedings, 50 cents: *Provided,* That where a premium [11] is charged for the issuance, execution, renewal or continuance of such bond the tax shall be 1 cent on each dollar or fractional part thereof of the premium charged: * * *

The court below evidently construed the phrase "any insurance company subject to the tax imposed by section * * * 246" as applying to a company which engaged in activities other than insurance resulting in substantial income, if those activities are "incidental" to the insurance business; and it considered that such activities might be incidental to the business of insurance even if, as in this case, the income from such activities "grew to enormous proportions," provided that it was the

[11] The Bureau construed this language as applying to the "premiums" collected by the respondent, and the respondent paid them without protest or claim of refund. (R. 24–25.)

"outgrowth of the genuine business of insurance." (R. 71.)

We contend that Section 246 included a much smaller class of companies and that its provisions were applicable only to corporations substantially all of whose income arises from the usual functions of insurance companies—writing insurance and making investments of the assets of the company and such other activities as are ordinarily incidental to underwriting.[12] Even if the test is not as severe as that, we submit that a company can not be considered as an insurance company subject to the tax imposed by Section 246 if its greatest source of income is something other than underwriting income or investment income as defined in that section.

If either of the tests which we have suggested is correct, the respondent did not come within the scope of Section 246.

II

THE RESPONDENT SHOULD BE CLASSIFIED AS AN INVESTMENT COMPANY AND NOT AS AN INSURANCE COMPANY

It is significant that in the four different tax returns filed by this company it described its business as that of "guaranteed mortgages," and that it was not until November, 1923, that it asserted that it

[12] This test is that which seems to have been followed in all published rulings of the Bureau. See S. M. 5501, C. B. V-1, 102; G. M. C. 2640, C. B. VI-2, p. 259; G. M. C. 5355, C. B. VII-2, p. 160; G. M. C. 6988, C. B. VIII-2, p. 213.

was an insurance company. It is, perhaps, worthy of mention that in 1903 it eliminated from its corporate name the word "insurance." (R. 18.) In one of its advertisements (Exhibit V, p. 2) the company stated:

> The sole business of this Company is to supply conservative investors with First Mortgages on Manhattan, Bronx, Brooklyn, Queens, Nassau, and Westchester real estate with principal and interest fully guaranteed by this company.

Although this statement may be subject to some explanation, it is an inescapable fact that what the company was really doing was making and selling loans. As Judge Chase said in his dissenting opinion (R. 72):

> What this plaintiff really does is to lend money, in the first instance, on the security of real estate first mortgages which it approves and is paid by the borrower for approving. It then becomes necessary for it to tap the reservoir of money controlled by the investing public to replenish its funds for use for additional lending on first mortgages on real estate.

Even if it is possible to call the contracts made by the respondent "insurance," they are much more than insurance. (See pp. 25–28, *infra*.) It is much more natural to consider the whole transaction a part of an investment business. The statutes of New York permit corporations organized

under the banking laws to make such contracts, and the findings state that at least two companies organized under the banking law did make mortgage loans and sell bonds and mortgages and participations therein with their guaranty in New York City, as their principal business, "under the same general method of doing business" as the respondent. (R. 24.)

It must be borne in mind that from a business point of view the sale of the mortgage and the issuance of the policy is a single transaction. A very large source of the respondent's income was its lending fees. It was able to do business in great volume only because it assigned the mortgages soon after making the loans. The payment by the investor to the respondent of the face amount of the mortgage was a most important element in the transaction. If the respondent had not received these sums, it would not have been able to continue to lend extensively on other mortgages, and its profits would have been tremendously curtailed. What the respondent was really doing was to operate as an investment company, procuring bonds and mortgages and disposing of them in a profitable manner. It would seem that the precise form which the transaction takes can hardly be determinative of whether or not the business is insurance—at least within the meaning of the statute here involved. Cf. *Lederer* v. *Fidelity Trust Co.*, 267 U. S. 17.

If the company had merely sold and assigned the bonds and mortgages, obviously the transactions would not have constituted insurance. Or if, as is customary in some States, the primary obligations of the mortgagors had been negotiable promissory notes and if the company had merely endorsed those notes and assigned the mortgages, the transactions would not have been insurance, although the endorsements would have served to make the company liable on the notes.

Still another form of transaction may be supposed. A company which has obtained mortgages may issue its own obligations in the form of bonds or notes and assign to the purchaser as security a certain mortgage or part of a certain mortgage. Such a transaction would certainly not be called insurance. Cf. *Mortgage Guarantee Co.* v. *Welch*, *supra*.

The steps taken by the respondent in respect of its mortgage loans resulted in creating substantially the same obligations as in the two cases last supposed. Where a mere fractional interest in a mortgage was "assigned," the respondent issued its so-called "guaranteed first-mortgage certificate" to the purchaser (whom the certificate designated as "the assured" or the "holder,") the certificate being assignable by endorsement when the assignment is registered on the books of the company. (R. 11; Exhibit U; R. 61–63.) By this certificate the respondent purported to assign an undivided share

or interest to the extent of a certain principal sum in a specified bond and mortgage. But the same instrument irrevocably constituted the respondent the agent of "the holder" to collect and receive the principal and interest and to exercise all other rights given to the mortgagee by the bond or mortgage. The respondent "guaranteed" to any lawful holder of the certificate payment of interest at a specified rate (which was less than the rate specified in the bond and mortgage) within five days after the same was due under the terms of the bond and mortgage until the principal was paid, and also payment of the principal sum—

> as and when collected, but in any event, within eighteen months after payment shall be demanded by the assured, provided such demand be made in writing after said principal sum shall have become due under the terms of said bond and mortgage, * * *.

It consequently appears that, at least until default by the respondent, the holder of the certificate would be allowed to exercise no rights against the mortgagor. The respondent was liable to make certain payments at certain times, regardless of whether the mortgagor paid or whether he was solvent. The respondent retained the bond and mortgage, the title policy and the fire insurance policies, and presumably the policies were issued to the respondent.

It is true that the purchaser was designated as "the assured," but the word "insure" was nowhere used in the certificate and it was not called a "policy."

It does not appear what percentage of the "premiums" received came from such certificates and what part of them came from the so-called "mortgage guarantee policies."

Although there is a little more basis for considering the mortgage guaranty policies as insurance, the rights and liabilities created by them were much the same as those created by the certificates. A "policy" was issued when the entire mortgage was assigned to a single person. (R. 22, 57–61; Exhibit T.) By this policy the company guaranteed to the holder payment of principal and interest at substantially the same times and upon substantially the same conditions as by the certificate. Here also the respondent was appointed the agent to collect the principal and interest on the bond and to exercise every privilege given by the bond and mortgage. Moreover, the "policy" authorized the respondent to buy in the property in the name of the "assured" and to take possession and management of it upon foreclosure until payment by the respondent to the "assured" or until the expiration of the time for making such payment. The "assured" agreed that the company might retain "as its premium for this guarantee all interest collected in excess of the rate guaranteed." But this so-called "premium" must have been intended to compensate the company for its services in making collections, and the like. And in view

of the fact that the respondent sold the mortgage at its face value, the profit on the transaction with the purchaser was the same as if the respondent had transferred the mortgage to the purchaser for a certain price above its face value.

Whether the issuing of such "policies" under such circumstances might ever properly be called insurance is a matter of considerable doubt. This precise question does not seem to have arisen except in connection with this statute, and the judges who have considered it have not been in agreement. In addition to the opinions in the instant case and those in *United States* v. *Home Title Insurance Company,* No. 356, see *Louisville Title Co.* v. *Lucas,* 27 F. (2d) 413, in which a District Court in Kentucky held that a similar guaranty was not "commonly understood as being a part of or incidental to the insurance business." The court there said:

> Of course, a guaranty of the payment of the obligation of another, according to the terms thereof, is not an insurance contract any more than is the indorsement of a negotiable instrument an insurance contract.

It seems well-nigh impossible to formulate an exact and comprehensive definition of "insurance." Insurance is, however, commonly defined as a contract of indemnity, whereby for an agreed premium one party undertakes to compensate the other for a loss on a specified subject, and property insurance (as distinguished from life insurance) is contem-

plated as a contract of hazard, under which liability arises only upon certain contingencies.[18]

The contracts under consideration here do not fall within these definitions. In the first place, the obligation of the respondent is not to indemnify another for a loss or to pay only in a certain event. The "assured" is not required, or indeed permitted, to seek to recover directly against the mortgagor. Payment to him is not contingent upon his suffering any loss: the company is to pay him certain amounts, regardless whether the mortgagor makes the payments or not. The obligation is absolute. It makes no difference whether the mortgagor is solvent or insolvent, whether the security is ample, or even whether the company itself has collected except as to the *time* for payment of the principal. In a sense, at least, the holder of the policy is insured against no risk; for there was never a moment when he had a risk, and his interest in the obligation of the mortgagor arose only by virtue of a transaction in which the giving of the policy itself was the fundamental feature. The "assured" is merely an investor, who wants to buy the obligation of the respondent and in many cases probably pays little attention to the particular security assigned to him.

Moreover, the one-half of 1% interest which the contracts allow the respondent to retain is not the kind of premium ordinarily known in insurance.

[18] A few typical definitions of insurance are collected in Appendix E, pp. 61–64, *infra*.

The "assured" pays it—if at all—through the mortgagor, but there is no agreement on the part of the assured to pay any part of it, and, as counsel for the respondent stated in the District Court, "the premium * * * might never be collected at all." Although this compensation is designated as a "premium" in the policy (Exhibit T) and the findings state that "in business usage [it] is called a premium," so is the amount above par at which a bond is sold. Moreover, no such designation of the one-half of 1% interest retained is made in the participation certificate.

It is true that there is a certain analogy between ordinary credit insurance [14] and a mortgage guaranty where the mortgage was never held by the guarantor, but the similarity wanes when the guaranty is given only as part of a transaction by which the mortgage is assigned or, in effect, sold. A closer analogy to such a guaranty is the obligation of a commission merchant who, in acting as agent for the sale of goods, guarantees payment as a *del credere* agent or promises absolutely to make payment for the price of goods himself at a certain time. Such contracts are exceedingly common, but we have been unable to find any case in which it has been contended that the obligation of such an

[14] Credit insurance has been held to be insurance. See *People* v. *Mercantile Credit Guarantee Co.*, 166 N. Y. 416, 418; *Shakman* v. *Credit System Co.*, 92 Wis. 366, 374; *State* v. *Phelan*, 66 Mo. App. 548, 559. See also United States Federal Reserve Board Bulletin 8, pp. 66–67, *et seq.*

agent was insurance.[15] Somewhat similar undertakings have been held not to be insurance in New York and other States.[16]

In a sense, innkeepers and common carriers are insurers against certain risks, but it would be absurd to say that a company operating a hotel or railroad was entitled to classification as an insurance company under the revenue laws.

III

THE FEES RECEIVED FROM THE MORTGAGORS WERE SUBSTANTIAL AND WERE NOT INCIDENTAL TO AN INSURANCE BUSINESS

These fees constituted a large part of the gross income of the respondent: during the years 1922 and 1923 the lending fees constituted the largest item in the respondent's gross income,[17] and with the extension fees they constituted almost one-half of the gross income of the respondent.[18] The making of the loans for which these fees were received and the services rendered in connection with them certainly was not insurance of any kind.

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[15] Cf. *State* v. *McAvoy*, 40 R. I. 437, 451; *Wasey* v. *Whitcomb*, 167 Mich. 58, 75; *Loch* v. *Hellman*, 83 N. Y. 601, 603.

[16] See cases on pp. 64 to 67, *infra*.

[17] It does not appear that the respondent segregated its expenses, and the findings give no indication as to the net profits from any distinct phase of the respondent's business.

[18] The exact figures are as follows (R. 24):

	Lending fees	Extension fees	Premiums	Interest
Year 1922	$655, 283. 70	$214, 303. 56	$619, 086. 38	$372, 795. 12
Year 1923	990, 855. 37	73, 745. 71	750, 803. 21	426, 842. 31

The Circuit Court of Appeals disposed of this phase of the respondent's business in the following passages of its opinion (R. 71):

> * * * During the taxable years in question plaintiff's income derived from lending fees and extension fees was nearly half of its total income, and was considerably greater than its "premium" income, and more than twice its "interest" income.
>
> * * * * * *
>
> * * * Such fees we regard as incidental to its business of insuring mortgages. It is true that during the years in question this item grew to enormous proportions, becoming substantially as large as the combined income from premiums and interest. Are we to say that this made plaintiff any less an insurance company? We think not. These incidental fees were the outgrowth of the genuine business of insurance and in earlier years had constituted but a small part of its income. Their tremendous increase in the years in question was during a period of great activity in building loans. Premiums also mounted, but not in like proportion, for they, being based upon interest, were extended throughout the term of the mortgage, while the incidental fees were collected in bulk when the loan was made. It would be possible to say that companies should shift in and out of the class of insurers according as such an incidental item

> of their income rises or falls. But, as the district judge pointed out, such a result would have disadvantages from the standpoint of administering the tax law, and is not a result likely to have been intended by Congress when the character of the taxpayer's business has not changed, and the only difference arises from the sudden flaring of what had previously been clearly an incident.

We submit that nothing in the record justifies the treatment of such fees "as incidental to its business of insuring mortgages." Apparently this conclusion is predicated upon the finding that commencing with the year 1921 there was a marked increase in building activity in New York City and a corresponding increase in the demand for mortgage loans. (R. 25.) Although the District Court found in accordance with the stipulation that "the primary purpose of the plaintiff in making loans on bonds and mortgages is not for investment but for the ultimate sale of the bonds and mortgages" (R. 23), it did not find that the profit derived from lending fees was not at all times an attractive aspect of the business. The record contains no information as to the amount of these fees for any year except 1922 and 1923. The findings do show that in 1913 the respondent's certificate was amended to include certain powers as permitted by the amendment of the law made in 1913. (R. 8, Exhibit C.) The company then, for the first

time, was allowed to lend money on mortgages. An examination of its reports to the Superintendent of Insurance for the State of New York reveals that in every year subsequent to that time its lending fees and extension fees were substantial:[19]

Even if guaranteeing mortgages sold be considered as insurance, the test which we have suggested as to what constitutes an insurance company subject to the tax imposed by Section 246 would rarely involve shifting a company like the respondent in and out of the class of insurers from year to year—probably only at times when it consciously amends its charter or its program. The instant case presents no difficulty of this kind, as its appears that during the years in question and for several years prior thereto a large percentage of the company's income came from a business which can not be regarded as insurance.

We submit that a corporation should be classified according to its activities during the year involved and not according to its original purposes. Cf. *United States* v. *Emery Bird, Thayer Realty Company*, 237 U. S. 28. Any disadvantages from the standpoint of administering the tax law which may-

[19] The figures are as follows:

Year	Lending and extension fees	Total income	Year	Lending and extension fees	Total income
1914	$189,281.59	$1,247,283.69	1918	$89,821.38	$1,184,840.29
1915	139,147.40	1,099,975.47	1919	184,782.50	1,287,531.64
1916	166,080.94	1,159,267.16	1920	392,665.87	1,591,006.52
1917	125,174.86	1,224,352.37	1921	498,654.99	1,649,735.57

arise from the test which we support seem far less serious than the wholesale exemption of income from taxation which will result from an affirmance of the decision of the court below.

Another very substantial item in the respondent's revenue was interest received, this having been approximately one-fifth of its entire income during the years 1922 and 1923. It is true that insurance companies of all kinds normally make investments of their assets from which they receive substantial amounts as dividends or interest. But ordinarily insurance companies invest their funds primarily for purposes of investment. This company, as has been pointed out, did not make the loans primarily for that purpose. Certainly the collection of such interest is not insurance, and, although the receipt of interest on investments may be a customary part of the activities of an insurance company, it is also a customary part of the activities of other types of corporations.

IV

THE FACT THAT THE RESPONDENT WAS INCORPORATED UNDER THE INSURANCE LAW OF NEW YORK IS NOT SIGNIFICANT

The opinion of the Circuit Court of Appeals in this case was handed down at the same time as its opinion in *Home Title Insurance Co.* v. *United States*, 50 F. (2d) 107 (pending in this Court as No. 356, October Term, 1931). In the *Home Title*

case the court said that the fact that the State "accepted plaintiff as an insurance company and subjected it to supervision by the department of insurance * * * should turn the scales if the question hangs in doubt," and presumably the decision in the instant case was influenced to some extent by this consideration.

We submit, however, that these facts are not conclusive or especially significant, and that they should not "turn the scales" in favor of the respondent here.

The New York statutes, under which the respondent was incorporated and in compliance with which it filed reports, were regulatory, and probably were designed primarily for the protection of the public. The placing of companies like the respondent under the supervision of the Insurance Superintendent evidently was due to administrative convenience rather than anything else. It is significant that the New York statute (p. 55, *infra*) requires "every corporation engaged wholly or *in part* in the transaction of the business of insurance in this state" to file statements with the Superintendent.

As we have pointed out, corporations organized under the banking laws of the State and subject to the supervision of the banking department are authorized to make mortgage loans and sell the same with their guaranty, and the record discloses that during the years in question two such corporations were regularly engaged in substantially the

same manner as was the respondent in selling to the investing public mortgages and participations in mortgages guaranteed by them. Such corporations were not required to make any reports to the Insurance Superintendent under the statute quoted above. This indicates that the business which was common to the respondent and such corporations was really not regarded as insurance by the State of New York. We submit that it is impossible that Congress intended that of two companies in a State which were carrying on substantially the same business, one should be subject to the tax because it happened to be organized under the banking laws, while the other should be exempt because it happened to be organized under the insurance laws.

The Circuit Court of Appeals regarded the case of *United States* v. *Cambridge Loan & Building Co.*, 278 U. S. 55, as apposite. There the Court held that a corporation was within the exemption from income tax granted by Section 231 of the Revenue Acts of 1918 and 1921 on the ground that it was a "domestic building and loan association," although it received deposits from persons who were not members and made loans to such persons. The Court alluded to the fact that the respondent was called a building and loan association by the Ohio statute under which it was organized, and said (p. 59):

> The statutes speak of "domestic" associations, that is, associations sanctioned by the several States. They must be taken to ac-

> cept, with the qualifications expressly stated, what the States are content to recognize, unless there is a gross misuse of the name. The State of Ohio has recognized and still recognizes the respondent as belonging to the class which its name indicates. Very possibly the company has strained its privileges to near the limit, but we are not prepared to condemn the nomenclature adopted by the State.

Other considerations also seem to have influenced the Court, but we do not regard even the passage of the opinion quoted above as applicable to the case at bar. For here the New York statute did not designate companies like the respondent as insurance companies, and long before the taxable years the respondent itself eliminated the word "insurance" from its corporate name. As has been pointed out, it did not describe itself as an insurance company in its tax returns.

Anyway, it would seem that Section 246 of the Revenue Act of 1921 indicated that Congress had its own criteria of insurance companies, irrespective of local law, and that it must have intended that its provisions should have uniformity of operation. Cf. *Weiss* v. *Wiener,* 279 U. S. 333, 337; *United States* v. *Childs,* 266 U. S. 304, 309.

The attitude of the respondent here in connection with its income taxes illustrates the difficulty in regarding it as an insurance company. It reported as income its lending fees and renewal fees, although it would seem that Section 246 did

not require this, as they are neither "underwriting income" nor "investment income." Apparently it has never asserted that it should escape paying an income tax on these items. Yet, as the exemption of Section 1000(b), upon which the respondent relies, applied only to an "insurance company subject to the tax imposed by section * * * 246," it can hardly assert that it was exempt from the excise tax under Section 1000 while subject, not to the tax imposed by Section 246, but to the tax imposed on commercial corporations generally by Section 230. For Section 246 provided that taxes imposed by it were "in lieu of the taxes imposed by sections 230 and 1000." If the respondent's position in the instant case is tenable, it seems somewhat difficult to sustain even the decision in *Title Guarantee & Trust Co.* v. *United States*, 49 F. (2d) 641 (S. D. Cal.). There a corporation, which complied with the requirements of the statutes of California regarding the insurance business also maintained a trust department which was under the inspection of the banking commissioner. It contended that it was taxable under Section 246 and that consequently certain items, including escrow fees, were not taxable. These fees were charged to persons arranging to purchase property, to negotiate a mortgage, or to consummate any transaction wherein documents were to be delivered or title passed upon title being shown as required. The company acted as a searcher of records in its title department, and sometimes is-

sued policies of title insurance which the court considered to be "strictly * * * 'insurance.'" The court said (p. 643):

> The argument on behalf of the plaintiff is that the main and principal business of the corporation is that of title insurance, and that the trust department and the escrow department are merely incidental and contributing agencies. * * * It is said that the escrow business is a necessary and natural feeder to such insurance business.
>
> * * * The corporation here had the option of limiting its business operations and functions to those which are the well-known attributes of insurance writing, but it can not combine with insurance work a variety of other classes of profitable business and claim the exempt status which will result in its being relieved of a considerable tax which it would have to pay were the business other than insurance conducted separately. It would seem to be just as reasonable to argue that this company might engage in real estate brokerage, and maintain the claim that that business was merely an incidental adjunct operating as a "feeder" to its title insurance business, as to say that its trust department and also its escrow department were merely incidental to the insurance business. To so expand the business permitted of an insurance concern would result in a situation that certainly was not contemplated when the statute was passed.

CONCLUSION

We respectfully submit that the judgment of the court below should be reversed.

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JANUARY, 1932.

APPENDIX A

FEDERAL STATUTES

Revenue Act of 1921, c. 136, 42 Stat. 227, 252, 262, 263, 294:

CAPITAL-STOCK TAX

SEC. 1000. (a) That on and after July 1, 1922, in lieu of the tax imposed by section 1000 of the Revenue Act of 1918—

(1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to $1 for each $1,000 of so much of the fair average value of its capital stock for the preceding year ending June 30 as is in excess of $5,000. In estimating the value of capital stock the surplus and undivided profits shall be included;

(2) Every foreign corporation shall pay annually a special excise tax with respect to carrying on or doing business in the United States, equivalent to $1 for each $1,000 of the average amount of capital employed in the transaction of its business in the United States during the preceding year ending June 30.

(b) The taxes imposed by this section shall not apply in any year to any corporation which was not engaged in business (or, in the case of a foreign corporation, not engaged in business in the United States) during the preceding year ending June 30, nor to any corporation enumerated in section

231, nor to any insurance company subject to the tax imposed by section 243 or 246.

(c) Section 257 shall apply to all returns filed with the Commissioner for purposes of the tax imposed by this section.

(Section 231 enumerates in fourteen paragraphs organizations which are exempt from taxation, including labor and agricultural organizations, mutual savings banks, etc. This is in no way involved in this case. Section 243 imposes a tax upon the net income "of every life insurance company" and is not here involved. Section 257 provides that the returns shall be public records.)

TAXES ON INSURANCE COMPANIES

SEC. 246. (a) That, in lieu of the taxes imposed by sections 230 and 1000, there shall be levied, collected and paid for the calendar year 1922, and for each taxable year thereafter, upon the net income of every insurance company (other than a life or mutual insurance company) a tax as follows:

(1) In the case of such a domestic insurance company the same percentage of its net income as is imposed upon other corporations by section 230;

* * * * *

(b) In the case of an insurance company subject to the tax imposed by this section—

(1) The term "gross income" means the combined gross amount, earned during the taxable year, from investment income and from underwriting income as provided in this subdivision, computed on the basis of the underwriting and investment exhibit of the annual statement approved by the National Convention of Insurance Commissioners;

(2) The term "net income" means the gross income as defined in paragraph (1) of this subdivision less the deductions allowed by section 247;

(3) The term "investment income" means the gross amount of income earned during the taxable year from interest, dividends and rents, computed as follows:

To all interest, dividends, and rents received during the taxable year, add interest, dividends and rents due and accrued at the end of the taxable year, and deduct all interest, dividends and rents due and accrued at the end of the preceding taxable year;

(4) The term "underwriting income" means the premiums earned on insurance contracts during the taxable year less losses incurred and expenses incurred;

(5) The term "premiums earned on insurance contracts during the taxable year" means an amount computed as follows:

From the amount of gross premiums written on insurance contracts during the taxable year, deduct return premiums and premiums paid for reinsurance. To the result so obtained add unearned premiums on outstanding business at the end of the preceding taxable year and deduct unearned premiums on outstanding business at the end of the taxable year;

(6) The term "losses incurred" means losses incurred during the taxable year on insurance contracts, computed as follows:

To losses paid during the taxable year, add salvage and reinsurance recoverable outstanding at the end of the preceding taxable year, and deduct salvage and reinsurance recoverable outstanding at the end of the taxable year. To the result so obtained add all unpaid losses outstanding at the end

of the taxable year and deduct unpaid losses outstanding at the end of the preceding taxable year;

(7) The term "expenses incurred" means all expenses shown on the annual statement approved by the National Convention of Insurance Commissioners, and shall be computed as follows:

To all expenses paid during the taxable year add expenses unpaid at the end of the taxable year and deduct expenses unpaid at the end of the preceding taxable year. For the purpose of computing the net income subject to the tax imposed by this section there shall be deducted from expenses incurred as defined in this paragraph all expenses incurred which are not allowed as deductions by section 247.

SEC. 247. (a) That in computing the net income of an insurance company subject to the tax imposed by section 246 there shall be allowed as deductions:

(1) All ordinary and necessary expenses incurred, as provided in paragraph (1) of subdivision (a) of section 234;

(2) All interest as provided in paragraph (2) of subdivision (a) of section 234;

(3) Taxes as provided in paragraph (3) of subdivision (a) of section 234;

(4) Losses incurred;

(5) Bad debts in the nature of agency balances and bills receivable ascertained to be worthless and charged off within the taxable year;

(6) The amount received as dividends from corporations as provided in paragraph (6) of subdivision (a) of section 234;

(7) The amount of interest earned during the taxable year which under paragraph (4) of subdivision (b) of section 213 is exempt

from taxation under this title, and the amount of interest allowed as a credit under subdivision (a) of section 236;

(8) A reasonable allowance, for the exhaustion, wear and tear of property, as provided in paragraph (7) of subdivision (a) of section 234;

(9) In the case of such a domestic insurance company, the net income of which (computed without the benefit of this paragraph) is $25,000 or less, the sum of $2,000; but if the net income is more than $25,000 the tax imposed by section 246 shall not exceed the tax which would be payable if the $2,000 credit were allowed, plus the amount of the net income in excess of $25,000.

* * * * *

TAX ON CORPORATIONS

SEC. 230. That, in lieu of the tax imposed by section 230 of the Revenue Act of 1918, there shall be levied, collected, and paid for each taxable year upon the net income of every corporation a tax at the following rates:

(a) For the calendar year 1921, 10 per centum of the amount of the net income in excess of the credits provided in section 236; and

(b) For each calendar year thereafter, 12½ per centum of such excess amount.

APPENDIX B

REGULATIONS

Treasury Regulations 62, promulgated under the Revenue Act of 1921.

ART. 691. *Tax on insurance companies.*—For the calendar year 1921 all insurance companies (other than life) are subject to taxes imposed by sections 230 (corporation income tax) and 1000 (capital stock tax) and Title III (war profits and excess-profits tax). For the calendar year 1922 and thereafter, however, in lieu of such taxes, insurance companies, except life and mutual companies, are subject to the tax imposed by section 246. Mutual insurance companies (other than life) remain subject to the taxes imposed by sections 230 and 1000. In articles 691–693 the term "insurance companies" means only those companies subject to the tax imposed by section 246. The rate of the tax imposed by section 246 is the same as the rate imposed by section 230 (12½ per cent), but the net income upon which the tax is imposed, as defined in sections 246 and 247, differs from the net income of other corporations. Insurance companies are entitled to the benefit of section 204 (net losses) but not of section 206 (capital net gain). All provisions of the statute and of these regulations not inconsistent with the specific provisions of sections 246 and 247 are applicable to the assessment and collection of this tax, and insurance companies are subject to the same penalties as provided in the case of returns and payment

of income tax by other corporations. Since section 246 provides that the underwriting and investment exhibit of the annual statement approved by the National Convention of Insurance Commissioners shall be the basis for computing gross income and since the annual statement is rendered on the calendar-year basis, the first returns under section 246 will be for the taxable year ending December 31, 1922, and will be made on or before March 15, 1923.

ART. 692. *Gross income of insurance companies.*—Net income is gross income as defined in section 246 less the deductions allowed in section 247. Gross income is the combined gross amount earned during the taxable year from interest, dividends, rents, and premium income, computed on the basis of the underwriting and investment exhibit of the annual statement approved by the National Convention of Insurance Commissioners. Gross income does not include gain derived from sale or disposition of capital assets, nor are losses sustained from such sale or disposition allowable deductions. It does not include increase in liabilities during the year on account of reinsurance treaties; remittances from home office of a foreign insurance company to United States branch; borrowed money; gross profit on maturity of capital assets; gross increase due to adjustments in book value of capital assets and premium on capital stock sold. The underwriting and investment exhibit is presumed clearly to reflect the true net income of the company, and in so far as it is not inconsistent with the provisions of the statute will be recognized and used as a basis for that purpose. All items of the exhibit, however, do not reflect an insurance company's income

as defined in the statute. By reason of the definition of investment income, profit or loss on investment items is ignored, as well as those miscellaneous items which are intended to reflect surplus but do not properly enter into the computation of income, such as dividends declared, home office remittances and receipts, and special deposits. Gain or loss from agency balances and bills receivable not admitted as assets on the underwriting and investment exhibit will be ignored, excepting only such agency balances and bills receivable as have been charged off the books of the company as bad debts, or having been previously charged off are recovered during the taxable year.

ART. 693. *Deductions allowed insurance companies.*—Insurance companies are entitled to the deductions specified in section 247. The deduction of $2,000 allowed domestic companies with net income not exceeding $25,000 is identical with the specific credit allowed other corporations by section 236 (b) and there is the same equalizing provision in the case of incomes slightly in excess of $25,000. See article 591. A domestic insurance company is also entitled to the credit for income, war profits, and excess-profits taxes paid during the taxable year to any foreign country or to any possession of the United States which is allowed other domestic corporations by section 238. See article 611. Among the items which may not be deducted are income and profits taxes, paid or accrued, imposed by the United States and so much of the income and profits taxes imposed by any foreign country or possession of the United States as is allowed as a credit under section 238; taxes assessed against local benefits; donations; de-

crease during the year due to adjustments in book value of capital assets; decrease in liabilities during the year on account of reinsurance treaties; dividends paid to stockholders; remittances to home office of a foreign insurance company by United States branch; and borrowed money repaid.

APPENDIX C

NEW YORK STATUTES

Laws of New York, 1892, c. 690, Vol. 2:

ARTICLE V

TITLE AND CREDIT GUARANTY CORPORATIONS

§ 170. *Incorporation.*—Five or more persons may form a corporation for either one or the other of the following purposes:

I. To examine titles to real property and chattels real, to procure and furnish information in relation thereto, make and guarantee the correctness of searches for all instruments, liens or charges affecting the same; and guarantee or insure bonds and mortgages and the owners of real property and chattels real and other interested therein against loss by reason of defective titles thereto and other incumbrances thereon, which shall be known as a title guaranty corporation;

The above provisions were amended by the Laws of New York, 1900, c. 226, Vol. 1; Laws of New York, 1901, c. 677, Vol. 2; Laws of New York, 1904, c. 543, Vol. 2; Laws of New York, 1909, c. 302, Vol. 1; Laws of New York, 1911, c. 525, Vol. 2; Laws of New York, 1913, c. 81, Vol. 1; and Laws of New York, 1913, c. 215, Vol. 1. The amendment made by the Laws of 1913, c. 215, was the law which was in effect when the respondent amended its charter

in 1913 and also was in effect during the taxable years here involved. This chapter reads as follows:

SECTION 1. Section one hundred and seventy of chapter thirty-three of the laws of nineteen hundred and nine, entitled "An act in relation to insurance corporations, constituting chapter twenty-eight of the consolidated laws," as amended by chapter three hundred and two of the laws of nineteen hundred and nine and chapter five hundred and twenty-five of the laws of nineteen hundred and eleven, is hereby amended to read as follows:

§ 170. *Incorporation.*—Five or more persons may form a corporation for one of the following purposes:

1. To examine titles to real property and chattels real, to procure and furnish information in relation thereto, make and guarantee the correctness of searches for all instruments, liens or charges affecting the same, guarantee or insure the payment of bonds and mortgages, or notes of individuals or partnerships secured by mortgages upon real property situated in this or any other state, and bonds, notes, debentures and other evidences of indebtedness of solvent corporations secured by deed of trust or mortgage upon real property situated in this or any other state, invest in, purchase and sell, with such guarantee or with guarantee only against loss by reason of defective title or incumbrances, bonds and mortgages, and notes of individuals or partnerships secured by mortgages upon improved and unincumbered real property situated in this or any other state worth fifty per centum more than the amount loaned thereon, and bonds, notes, debentures and other evidences of indebtedness of solvent corporations secured by deed

of trust or mortgages upon improved and unincumbered real property situated in this state or outside of this state worth fifty per centum more than the amount loaned thereon, and guarantee and insure the owners of real property and chattels real and others interested therein against the loss by reason of defective titles thereto and other incumbrances thereon, which shall be known as a title guaranty corporation; or

* * *

Laws of New York, 1901, c. 677, §2, as amended by Laws of 1916, c. 345, and Laws of 1929, c. 290, §3.

SEC. 174. *Merger.*—Any two or more corporations organized under subdivision one of section one hundred and seventy of this chapter, or organized under the laws of this state for the purposes or either of them mentioned in subdivision one of section one hundred and seventy of this chapter; or any one or more corporations organized under subdivision one of section one hundred and seventy of this chapter, or organized under the laws of this state for the purposes or either of them mentioned in subdivision one of section one hundred and seventy of this chapter, and any one or more corporations organized under article five of the banking law or under the laws of this state for the purposes or either of them mentioned in article five of the banking law; or any one or more corporations organized under subdivision one of section one hundred and seventy of this chapter, or organized under the laws of this state for the purposes or either of them mentioned in subdivision one of section one hundred and seventy of this chapter, and any

one or more corporations organized under article seven of the banking law or under the laws of this state for the purposes or either of them mentioned in article seven of the banking law, are hereby authorized to merge one or more of said corporations into another in the manner following: * * * Upon the merger of any corporation in the manner herein provided, all and singular the rights, franchises and interests of the said corporation so merged in and to every species of property, real, personal and mixed, and things in action thereunto belonging, shall be deemed as transferred to and vested in such corporation into which it has been merged, without any other deed or transfer; and the said last-named corporation shall hold and enjoy the same and all rights of property, franchises and interests in the same manner and to the same extent as if the said corporation so merged had retained the title, and continued to transact the business of such corporation; and the corporation into which merger has been made shall acquire, possess and retain all rights and privileges belonging to either of said corporations at the time of such merger provided that if one of the parties to such agreement be a corporation organized under article seven of the banking law, or under the laws of this state for the purposes or either of them mentioned in article seven of the banking law, the corporation into which merger has been made shall acquire, possess and retain only such rights and privileges to do business belonging to either of said corporations at the time of such merger as may at that time be possessed by the corporation into which they are merged, and shall

be subject only to the supervision of that department of the state government which theretofore had supervision over the corporation into which they are merged.

Section 16, c. 634, Laws of New York, 1910, amending Section 44 of c. 690, Laws, 1892, as amended by c. 493, Laws, 1897:

SEC. 44. *Reports of corporations.*—Every corporation, engaged wholly or in part in the transaction of the business of insurance in this state, whether heretofore or hereafter incorporated by a general or special law, shall annually, on the first day of January, or within two months thereafter, if a corporation under article two of this chapter, and on or before the fifteenth day of February, if a corporation under the other articles of this chapter, file in the office of the superintendent of insurance a statement verified by the oath of at least two of the principal officers of such corporation, showing its condition on the thirty-first day of December then next preceding, which shall be in such form and shall contain such matters as the superintendent shall prescribe. If a foreign corporation incorporated under the laws of a state or country outside of the United States, such oath may be made by the manager thereof within the United States. The superintendent may also address any inquiry to any such insurance corporation or its officers in relation to its doings or condition, or any other matter connected with its transactions. Every corporation so addressed shall promptly and truthfully reply in writing to any such inquiries, and such reply shall be verified, if required by the superintendent, by such officer of the corporation as he shall designate.

Laws of New York, 1914, c. 369:

SEC. 293. *General powers.*—In addition to the powers conferred by the general and stock corporation laws, an investment company shall, subject to the restrictions and limitations contained in this article, have the following powers:

1. To sell, offer for sale or negotiate bonds or notes secured by deed of trust or mortgages on real property situated in this state or outside of this state, or choses in action owned, issued, negotiated or guaranteed by it; to advance money upon the security of such bonds, notes or choses in action; to purchase or otherwise acquire such bonds, notes or choses in action and to pledge them to secure the payment of collateral trust bonds or notes; to sell or otherwise negotiate such collateral trust bonds or notes. [As amended by L. 1916, ch. 247, by adding the matter from the first semicolon to the end of the subdivision.]

SEC. 298. *Reports to superintendent; penalty for failure to make.*—On or before the first day of February in each year, every investment company and every foreign corporation licensed by the superintendent to transact the business of an investment company in this state, shall make a written report to the superintendent of banks which shall contain a statement of its condition on the morning of the first day of January in said year and shall be in the form and contain the matters prescribed by the superintendent. * * *

APPENDIX D

LEGISLATIVE HISTORY OF REVENUE ACT OF 1921

Report of Committee on Ways and Means, 67th Congress, 1st Session, Report No. 350, to accompany H. R. 8245 (p. 14):

LIFE INSURANCE COMPANIES

Sections 242–246: The provisions of the present law applicable to life insurance companies are imperfect and productive of constant litigation. Moreover, the taxes paid by life insurance companies under the income tax are inadequate. It is accordingly proposed in lieu of all other taxes to tax life insurance companies on the basis of their investment income from interest, dividends, and rents, with suitable deduction for expenses fairly chargeable against such investment income. The new tax would yield a larger revenue than the taxes which it is proposed to replace.

* * * * *

Senate Report No. 275, Calendar No. 289, 67th Congress, 1st Session, to accompany H. R. 8245 (p. 20):

TAXES ON LIFE INSURANCE COMPANIES

Sections 242–246 provide a new plan for the taxation of life insurance companies, substantially similar to the plan embodied in the revenue act of 1918 as first adopted by the Senate. The provisions of the present

law applicable to life insurance companies are imperfect and productive of constant litigation. The proposed plan would tax life insurance companies on the basis of their investment income from interest, dividends, and rents, with suitable deductions for expenses fairly chargeable against such investment income. The new tax would take the place of the present income and excess-profits taxes for the year 1921, and life insurance companies would share with other insurance companies in the repeal in the year 1922 of the capital stock tax and the taxes imposed by section 503. The new tax will yield a larger revenue than the taxes which it is proposed to replace.

Senate Document No. 73, 67th Congress, 1st Session (copy of the bill H. R. 8245) to reduce and equalize taxation (p. 107):

"~~SEC.~~ SEC. *246*. That every *life* insurance company not exempt under the provisions of section 231 shall make a return for the purposes of this Act. Such returns shall be made, and the taxes imposed by section 243 shall be paid, at the same times and places, in the same manner, and subject to the same conditions and penalties as provided in the case of returns and payment of income tax by other corporations, and all the provisions of this title not inapplicable, including penalties, are hereby made applicable to the assessment and collection of the taxes imposed by section ~~243~~" *243*.

(As printed the document shows the House Bill in Roman; All committee amendments in stricken-through type or italic, with such parts of committee amendments as reenact the present law of 1918 in

small capital italic, and new matter in regular italic.)

House of Representatives Report No. 486, 67th Congress, 1st Session, Conference report to accompany H. R. 8245 (pp. 39, 40, 41):

> Amendment No. 463: The House inserted in the bill a section providing for a new system of taxing life insurance companies, beginning with the calendar year 1922. The Senate amendment made the new system of taxing life insurance companies begin with the year 1921; and the House recedes. * * *
>
> Amendment No. 464. The House bill made the new system of taxing life insurance companies also applicable to other kinds of insurance companies. The Senate, by this amendment, made the scheme applicable only to life insurance companies and by amendment No. 495 provided a still different method of taxing certain other insurance companies; and the House recedes.
>
> * * * * *
>
> Amendment No. 495: The House bill provided specifically that every insurance company not exempt under the provisions of section 231 shall make a return for the purposes of this act. As section 239 provides that corporations (including insurance companies) subject to taxation under Title II shall make returns, Senate amendment No. 495 strikes out the above provision of the House bill as surplusage and provides a new system of taxing insurance companies (other than life or mutual insurance companies). The Senate amendment defines the term "gross income" of such companies to mean the combined gross amount earned during the taxable year from investment income and from underwriting income computed

on the basis of the underwriting and investment exhibit of the annual statement approved by the National Convention of Insurance Commissioners. "Expenses incurred" are defined to mean all expenses shown on the aforementioned annual statement approved by the National Convention of Insurance Commissioners; but for the purpose of computing taxable net income only those expenses specifically allowed may be deducted. The House recedes with an amendment making clerical changes.

SECTION 246 OF THE REVENUE ACT OF 1924

Senate Report No. 398, Calendar No. 388, 68th Congress, 1st Session (p. 29):

Section 243: The rate of tax upon insurance companies taxed under this section and section 246 has been retained at 12½ per cent, as in the existing law. Since these companies are not subject to the capital stock tax under the existing law, the repeal of that tax does not affect them, and consequently does not justify an increase in the rate of income tax upon them.

APPENDIX E

DEFINITIONS OF INSURANCE AND CASES THROWING LIGHT ON THE QUESTION OF WHAT CONSTITUTES INSURANCE

In *Imperial Fire Insurance Co.* v. *Coos County,* 151 U. S. 452, 462, the Court said:

> Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy or policies, embodying the agreement of the parties. For a comparatively small consideration the insurer undertakes to guaranty the insured against loss or damage, upon the terms and conditions agreed upon, * * *

In *Washington Central Bank* v. *Hume,* 128 U. S. 195, 205, the Court said:

> * * * Marine and fire insurance is considered as strictly an indemnity; but while this is not so as to life insurance, which is simply a contract, so far as the company is concerned, to pay a certain sum of money upon the occurrence of an event which is sure at some time to happen, in consideration of the payment of the premiums as stipulated, nevertheless the contract is also a contract of indemnity. * * *

In *Empire Development Co.* v. *Title G. & T. Co.,* 225 N. Y. 53, 58, the court said:

> It has been said often that every policy of insurance is a contract of indemnity. The accuracy of this statement is a question of definition. If it means that wagers are pro-

> hibited; that the insured must possess an insurable interest, it is true to-day. But if the word "indemnity" is given a broader sense; if it means that whatever the language of the contract the insured may recover only the precise amount of the pecuniary damage caused to him by the contingency against which he seeks protection, then it is not now and never has been the inflexible rule.

One of the definitions of insurance most often quoted is the following, given in *Commonwealth* v. *Wetherbee,* 105 Mass. 149, 160:

> * * * an agreement by which one party, for a consideration (which is usually paid in money either in one sum or at different times during the continuance of the contract of the risk), promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest.

This definition was adopted by Massachusetts Insurance Act of 1887, c. 214, par. 3. See *Claflin* v. *United States Credit System Co.,* 165 Mass. 501, 502.

In *Glendale Manufacturing Co.* v. *The Protection Insurance Co.,* 21 Conn. 19, 31, the court said:

> The contract of insurance, as all know, is a contract of indemnity, upon the terms and conditions specified in the policy of insurance. It is a peculiar contract—and one of hazard purely. The insurer undertakes, for a comparatively small premium, to guaranty the insured against loss or damage, upon the exact terms and conditions agreed on, and upon no other. * * *

Bouvier's Law Dictionary (Unabridged, Rawle's Third Revision), defines insurance as follows:

> A contract whereby, for an agreed premium, one party undertakes to compensate the other for loss on a specified subject by specified perils.

The Standard Dictionary defines insurance as follows:

> An act or system of insuring or assuring against loss; specifically, the act or system by or under which indemnity or pecuniary payment is guaranteed by one party (as a company, society, association, or individual) or several parties to another party in certain contingencies under specified terms; * * * a contract whereby one party, in consideration of a stipulated consideration or premium, undertakes to pay a given sum or sums upon the occurrence of a certain contingency, as upon injury to one's person, or upon one's death, or upon the destruction of one's property by fire or otherwise.

The opinion in *People* v. *Rose,* 174 Ill. 310, copies many definitions of insurance, and among them the following:

> Insurance is a contract whereby one, for a consideration, undertakes to compensate another if he shall suffer loss. Such, in its most general terms, is the definition of the contract which is to constitute the subject of the following chapters. It is substantially the definition given long ago by Roccus, and is recommended alike by its brevity and its comprehensiveness—qualities upon which subsequent writers have scarcely been able to improve. * * * It had its origin in the necessities of commerce. It has kept pace with its progress, expanded to meet its rising wants and to cover its ever widening fields, and, under the guidance of the spirit of modern enterprise tempered by a prudent

forecast, it has, from time to time, with wonderful facility adapted itself to the new interests of an advancing civilization. It is applicable to every form of possible loss. Wherever danger is apprehended or protection required it holds out its fostering hand and promises indemnity. 1 May on Insurance, secs. 1, 2.

* * * * *

In law, a contract by which one party, for an agreed consideration, which is proportioned to the risk involved, undertakes to compensate the other for loss on a specified thing from specified causes. Century Dic., "Insurance."

* * * * *

For further definitions and references to cases as to what constitutes insurance, see 63 A. L. R. 711; 47 L. R. A. (N. S.) 291.

CASES HOLDING THAT VARIOUS CONTRACTS WERE NOT INSURANCE

In *Stern* v. *Rosenthal,* 71 Misc. (N. Y.) 422, the plaintiff entered into an oral agreement with the defendants under which the latter hired the plaintiff to make up trousers material supplied by the defendants. In consideration of the payment by the plaintiff of one dollar to be deducted by defendants from every $100 worth of work done upon defendants' material by plaintiff, the defendants agreed to pay plaintiff the value of the labor put upon said material, if the same should be damaged or destroyed by fire. Some of the materials were destroyed by fire and the plaintiff claimed the value of work performed, $575 less

$5.75 to be deducted. The defendants contended that the contract sued upon was a contract of insurance and as such was invalid as the defendants had not complied with the insurance law.

The Appellate Term held that this was not insurance, and said (pp. 424–425):

> An analysis of the contract shows that it lacks an essential element to enable it to be treated as a contract of insurance. There can be no contract of insurance unless there be a risk insured against. As Lord Mansfield said, in the early case of *Tyrie* v. *Fletcher* (Cowp. 666): "The underwriter receives a premium for running the risk of indemnifying the insured and whatever cause it be owing to, if he does not run the risk, the consideration for which the premium or money was put into his hands fails, and therefore he ought to return it."
>
> In the contract under consideration the defendants ran no risk. They were obligated to pay the plaintiff, for his labor absolutely and unconditionally. If the goods were not destroyed, they were bound to pay the plaintiff, and if the goods were destroyed they were required to pay him. * * * The defendants' obligation was merely to pay the plaintiff for his labor, and this labor was necessarily to be performed before the goods were destroyed. The defendants' obligation was in no sense contingent. If the goods were not destroyed, they were required to pay the plaintiff for his labor when the goods were returned to them. If the goods could not be returned to them on account of their destruction by fire, they were also to pay the plaintiff for the labor which he had performed upon them up to that time. In either event the defendant's obligation to

pay was absolute. In no event was the obligation of the defendants to pay contingent upon any risk. Any risk which the defendants ran related to the goods and not to their obligation to pay for the labor of the plaintiff. The payment which the defendants agreed to make was not to be made to the person who suffered the loss. The payment was to be made to the person hired for the services which he had rendered.

In *Commonwealth* v. *Provident Bicycle Asso.*, 178 Pa. St. 636, the court held that a corporation which accumulated a fund by assessment from its members and agreed to clean and repair the bicycles of members and replace bicycles destroyed or stolen was not engaged in the insurance business within the meaning of the insurance law of that State.

In *Hansen* v. *Dodwell Dock & Warehouse Company,* 100 Wash. 46, the plaintiff below sued his employer for damages resulting from personal injuries caused by an assault while he was in the employ of the defendant. The plaintiff, who was employed at the time of a strike, based his action upon a contract by which his employers agreed to furnish him a safe place in which to work "free from assault on the part of any persons whatsoever." The court held that this contract was not void as a contract of insurance within the meaning of the laws of the State relating to that subject.

In *Cole* v. *Haven,* 7 N. W. 383 (Ia.), the plaintiff sued upon a contract under which the defendant installed lightning rods and agreed to

make good "all such immediate loss or damage as may occur by lightning communicated directly to said building, * * * to an amount not to exceed $500." The court held that the contract was not void as a contract of insurance made by a person who had not complied with the laws of Iowa in relation to insurance companies.

Evans & Tate v. *Premier Refining Co.*, 31 Ga. App. 303, involved a contract by which, in consideration of the purchase of lubricant, the plaintiff "insured the defendants against the breakage, by natural wear and tear of the gears of the automobiles of such persons as purchased the lubricant from the defendants." The court held that this was not a contract of insurance within the meaning of the statute requiring a person to obtain a license before transacting insurance within the State.

See also *In re Denton's Estate* (1903) 2 Ch. 670; (1904) 2 Ch. 178.

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SEP 28

CHARLES ELMO

IN THE

Supreme Court of the United States

OCTOBER TERM—1931.

No. 355.

FRANK COLLIS BOWERS, as Executor of the Estate of Frank K. Bowers, formerly United States Collector of Internal Revenue, deceased,

Petitioner,

—against—

LAWYERS MORTGAGE COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Opinions.

The opinion of the District Court is reported in 34 F. (2d) 504. The opinion of the Circuit Court of Appeals is reported in 50 F. (2d) 104.

Jurisdiction.

Jurisdiction of this Court is by virtue of Section 240 (a) of the Judicial Code, as stated in petitioner's brief.

Statement.

Petitioner's statement of the question presented and the facts is incomplete and inaccurate.

The question presented is whether the respondent was

exempt from capital stock tax under Section 1000 (b) of the Revenue Act of 1921, exempting from the tax "any insurance company subject to the tax imposed by section 243 or 246". The latter sections imposed income taxes, Section 243 on "every life insurance company", and Section 246 on "every insurance company (other than a life or mutual insurance company)", in lieu of the income tax and capital stock tax imposed upon business corporations generally by Sections 230 and 1000.

The respondent is a stock corporation, incorporated in 1893 as a mortgage and title insurance company, under Article V of the Insurance Law of the State of New York (R. 18, 39-40). It has operated in New York as an insurance company ever since (R. 19, 41), but has never engaged in title insurance (R. 22, 44). Prior to the amendment of the New York Insurance Law in 1913 (L. 1913, c. 215) and the amendment of respondent's charter accordingly (R. 18, 40), respondent's sole business was insuring the payment of outstanding mortgages owned by others, as the Circuit Court of Appeals pointed out (R. 147); and such business is still substantial in amount (R. 27, 49). This basic feature of respondent's business has been ignored by the petitioner in his statement of the question presented and in his argument. His only reference to it is the four-line statement at page 4 that such policies are issued "in a few cases"—a limitation not in accordance with the record.

In making mortgage loans and selling the mortgages with its insurance, as permitted by the 1913 amendments, the respondent makes no profit on the sales (R. 28, 49-50). Its primary purpose is the sale of the mortgages with its insurance, which *always* accompanies the sales (R. 28, 49-50).

ARGUMENT.

I.

The decision below was correct.

a. *Nature of respondent's business.*

Insurance of mortgages which the respondent never owned is unquestionably insurance business. After the 1913 amendments, investors wishing to invest in mortgages, with respondent's insurance, usually came directly to the respondent to obtain such mortgages, instead of making mortgage loans themselves and then insuring the mortgages with the respondent. The bulk of the respondent's business was accordingly done in that way, as a logical development which the amendment of the statute was undoubtedly intended to promote. It was none the less insurance, whether the respondent had previously owned the mortgages or not.

The figures quoted by the petitioner are misleading. In 1918, respondent's gross income from lending and extension fees was only $89,821, as against $299,162 interest on investments and $658,699 premiums (Exhibit M, R. 77). Commencing with the year 1921, there was a marked increase in building activity in New York and a corresponding increase in the demand for mortgage loans, especially building loans (R. 31, 52), the rates for which were higher (R. 29, 50-51). Those conditions explain the subsequent marked increase in the ratio of fees to other income.

b. *Mortgage insurance is recognized branch of insurance.*

Mortgage insurance is a well-recognized form of insurance, not only in New York, but in other States.

The People v. *Potts,* 264 Ill. 522.

It was recognized as such in the Revenue Act of 1918 (the immediate predecessor of the Revenue Act of 1921), which, in Title XI, Schedule A, subdivision 2, imposed a stamp tax "on all policies of guaranty and fidelity insurance, including * * * mortgage guarantee policies". Respondent paid stamp taxes on all its policies under that provision (R. 30, 52), regardless of whether it had previously owned the mortgages or not.

The hollowness of the petitioner's main argument, that mortgage insurance is not a commonly recognized form of insurance and should not be recognized in construing the 1921 Act, is evident, not only from such express recognition of mortgage insurance as such in the preceding Revenue Act, but also from the Treasury Department's admissions that the respondent was doing an insurance business (R. 77-78, 81, 134), before the present argument was thought of.

c. *The statute.*

The Revenue Act of 1921 segregated insurance companies (except mutual companies other than life) in imposing income taxes, and exempted them from capital stock taxes. The reason for the change was because, as the numerous cases in this Court have demonstrated, the statutory provisions imposing income tax on business corporations were difficult to apply to insurance

companies, on account of the special system of accounting required for such companies. The purpose of the change was to permit income taxes to be assessed upon the same general basis as the annual reports of insurance companies to the State Insurance Departments, as is shown by the references in the statute to the "annual statement approved by the National Convention of Insurance Commissioners" (*i. e.*, the forms prescribed by State Insurance Commissioners for such annual reports). It was not a statute of exemption; for the reports of both the Ways and Means Committee of the House and the Finance Committee of the Senate, when the bill was introduced, stated that the new tax (originally limited to life insurance companies only) would produce a larger revenue than the taxes replaced.[1]

d. *Respondent was clearly entitled to classification as an insurance company, under the statute.*

Respondent's business was a form of insurance generally recognized as such and taxed as such under the preceding Revenue Act. Being an insurance company filing annual reports under State law (R. 19, 41), it was within the obvious purpose of the statute. Moreover, in the absence of any statutory definition of the term, "insurance company", it must be construed as referring to insurance companies recognized as such under State laws.

United States v. *Loan & Bldg. Co.*, 278 U. S. 55.

In the case cited, the Treasury Department claimed

[1] 67th Cong., 1st Sess., House Report No. 350, p. 14; Senate Report No. 275, p. 20.

that a building and loan association organized and operating under the laws of Ohio was not entitled to the exemption from income tax granted to building and loan associations, since an analysis of its business showed that it was doing primarily a banking business. The reasons advanced for disregarding the State classification in that case were almost identical with those advanced in the present case; and they had much more support in the facts. Nevertheless, this Court held that the exemption should be construed as applying to building and loan associations recognized as such under State laws.

It is submitted that this decision is conclusive. In the present case, there are additional reasons why State classification should be adhered to. As just pointed out, the statute itself shows that Congress had State classification in mind. Moreover, under any arbitrary classification based upon an analysis of the business done, the status of many corporations would change from year to year for income tax purposes, and any orderly enforcement of the capital stock tax would have been absolutely impossible. That tax, as explained at length in the Treasury Regulations, was prospective, payable in advance on a return due in July for the privilege of doing business during the Government fiscal year from July 1 to the following June 30 (Regs. 64, Arts. 2, 14, 20), whereas income taxes were assessed on the calendar year basis. Obviously, no corporation could possibly determine in advance in July, when capital stock tax returns were due, whether its business for the remaining six months of that calendar year and the first six months of the following calendar year would result in its being classed as an insurance company for income tax purposes or not.

c. *For the foregoing reasons, the judgments of the lower courts were clearly correct.*

II.

No adequate ground for a review by this Court is shown.

None of the four reasons advanced by the petitioner for granting the writ is adequate.

1. Capital stock taxes were repealed in 1926 (Revenue Act of 1926, Sec. 1200a). They were comparatively small in amount ($1 per $1,000 of value of capital stock) and in themselves afford no ground for a review by this Court.

The differences in *income* taxation between insurance companies and other corporations, which have been retained in subsequent statutes, should, it is submitted, be reviewed only in a case where income taxes are in issue, so as to present clearly to this Court the differences in the two methods of income taxation. For example, the suggestion on page 10 of petitioner's brief that respondent's fees for making loans might escape income tax if the respondent were held to be an insurance company is a transparent argument *in terrorem*. No claim is made that the respondent has ever raised any such issue. On the contrary, respondent's income tax returns for 1921, 1922 and 1923 were introduced in evidence (Exhibits N, O and P) and show that the respondent voluntarily reported such fees as taxable income (R. 21-22, 43-44). As respondent's claims for refund of capital stock taxes were filed on November 14, 1923 (R. 20, 21, 42), four months before its income tax return for the year 1923, which was filed on March 15, 1924 (R. 22, 44), the record shows that the respondent

made no claim that such fees were not subject to income tax, in asserting its right to classification as an insurance company.

In stating on page 7 the large amounts of taxes involved in other cases as a ground for review, the petitioner fails to specify the nature of the cases. It is reasonable to assume that most of them are income tax cases, on which the decision of the present case would have at most only an indirect bearing; and from the second reason advanced by the petitioner (treated in the next paragraph), it may be inferred that cases involving stamp taxes are also included.

2. Whether guaranteed mortgage certificates are, or are not, subject to stamp tax as corporate securities obviously depends upon the form of the certificate and not upon the classification of the corporation which issues them. The certificates considered in *Mortgage Guarantee Co.* v. *Welch,* 38 F. (2d) 184, cert. den. 281 U. S. 759, were interest-bearing certificates secured by the deposit of some $22,000,000 of mortgages with a trust company. They thus differed in essential particulars from the form of guaranteed first mortgage certificate issued by the respondent (Exhibit U, R. 128-132), which assigns a specific undivided interest in a single, specified mortgage; but whether they, or the certificates of any other company, are or are not subject to stamp tax does not, it is submitted, depend in any way upon the decision of the present case.

3. Petitioner admits that there is no conflict of decisions of Circuit Courts of Appeals. Aside from the *Home Title Insurance Company* case (decided with the case at bar), petitioner is able to cite only two other

court decisions in point, although the statute was enacted in 1921. In both the latter cases cited, the companies involved were conducting separate departments of business outside the scope of ordinary mortgage and title insurance. The present cases are quite distinct, since both the *Home Title Insurance Company* and the respondent were doing only the usual form of mortgage and title insurance business.

4. As to the scope and effect of the decision of this Court in the *Cambridge Loan and Building Company* case, already discussed (*supra*, pp. 5-6), it is of course recognized that State laws are not conclusive in construing an Act of Congress. Where, however, Congress uses the term, "insurance company", without defining it, there are the same reasons for construing it with reference to State law that were applied by this Court in construing the term, "building and loan association". There are the additional reasons, already pointed out, why the statute should not be construed as requiring, or permitting, the Treasury Department to examine into the business of every corporation filing an income tax return and to determine arbitrarily, according to standards of its own, whether such corporation should, or should not, be classed as an insurance company.

III.

The petition should be denied.

Washington, D. C., September, 1931.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM—1931.

No. 355.

FRANK COLLIS BOWERS, as Executor of the Estate of Frank K. Bowers, formerly United States Collector of Internal Revenue, deceased,

Petitioner,

—against—

LAWYERS MORTGAGE COMPANY,

Respondent.

BRIEF FOR RESPONDENT.

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Petitioner,

—against—

LAWYERS MORTGAGE COMPANY,

Respondent.

BRIEF FOR RESPONDENT.

On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Opinions.

The opinion of the District Court (R. 15-18) is reported in 34 F. (2d) 504. The opinion of the Circuit Court of Appeals (R. 68-73) is reported in 50 F. (2d) 104.

Jurisdiction.

Jurisdiction of this Court is by virtue of Section 240 (a) of the Judicial Code, as stated in petitioner's brief. The judgment to be reviewed was dated June 8, 1931 (R. 74). Petition for certiorari was filed on September 5, 1931 (R. 74); and the petition was granted on October 26, 1931 (R. 74).

Statement.

The statement of the question presented and of the facts in petitioner's brief is incomplete and inaccurate, because petitioner's counsel have attempted to avoid any admission that mortgage insurance is a recognized branch of insurance. Also, as a concession to the Government's position, the description of respondent's business in the stipulation and in the findings (R. 7-15; 18-26) was stated in the reverse of the logical order. The actual facts are simple.

The respondent was incorporated in New York under Article V of the Insurance Law in 1893 (R. 7, 18). Its charter authorized it to do title and mortgage insurance, as permitted by paragraph 1 of Section 170; but it has never engaged in title insurance (R. 9, 20).

In insuring mortgages, it issues a regular policy of mortgage insurance or guaranty (R. 12, 22), the form of which is in evidence as Exhibit T (R. 57-61). Under the policy, the respondent guarantees to the assured the payment of interest at a specified rate within five days after it becomes due under the mortgage insured, and payment of the principal as and when collected, but in any event within eighteen months after written demand by the assured (R. 57). The rate of interest specified in the policy is usually ½ of 1% less than the rate of interest in the mortgage insured (R. 11, 12, 22, 23). By accepting the policy, the assured appoints the respondent its agent to collect the interest and principal (R. 57-58); and the policy authorizes the respondent to retain such excess interest (*i. e.*, ½ of 1%), as the premium for its guaranty (R. 58).

Prior to 1911, mortgage insurance companies in New

York were limited to such insurance of outstanding mortgages held by others, paragraph 1 of Section 170, Article V, authorizing them only to "guarantee or insure the payment of bonds and mortgages". Respondent's charter authorized only such business (Exhibit A, Exhibit B, R. 7, 8, 18, 19); and, as the Circuit Court of Appeals pointed out (R. 69), it was respondent's sole business, prior to 1913. This elementary feature of respondent's business is still substantial in amount (R. 12, 23); and counsel for the Government conceded in the District Court that it was strictly insurance business (R. 15, 17). It has been entirely ignored by counsel for the petitioner in their brief in this Court, both in the argument and, except for the four-line statement at page 7, in the statement of facts.

The New York statute was amended by L. 1911, ch. 525, and later by L. 1913, ch. 215, so as to authorize title and mortgage insurance companies organized under paragraph 1, Section 170, Article V, to *invest in, purchase and sell,* with their guarantee, bonds and mortgages of specified classes. The respondent's certificate of incorporation was amended accordingly in December, 1913 (R. 8, 19; the amended certificate, Exhibit C, has not been printed in the record, but the complaint, at R. 2, shows the amended statement of purposes and powers, which is a paraphrase of the statute).

The statutory amendments were no doubt partly due to the fact that, as the findings show (R. 12, 22), lenders about to make loans on bond and mortgage sometimes make it a condition in advance that the respondent (or some other mortgage insurance company) will insure the mortgage, when made. The amendments authorizing such companies to invest in and sell mort-

gages, with their guarantee, enabled the companies to act in effect as clearing houses between borrowers and lenders; and the companies were also enabled, by making mortgage loans themselves, to offer to investors wishing to invest in guaranteed bonds and mortgages a wide range of choice of desirable mortgage loans which they could purchase, with insurance, directly from the mortgage insurance companies, instead of themselves having to find and make desirable loans and then have the mortgages insured.

Following such amendment, during the period now under consideration, the bulk of the respondent's business was accordingly done by making mortgage loans in its own name and selling the bonds and mortgages to investors, with its insurance, in the manner described at length in the findings (R. 10-11, 21-22). The loans were made on application (R. 10, 21), the borrower paying for the title insurance, survey and other expenses, and the respondent receiving a lending fee, including its appraisal charges (*id.*). Such lending fees (and extension fees on renewals of mortgages) were at the prevailing rates charged by other lenders (R. 13, 23-24). In occasional cases, the respondent actually acted as a clearing house, receiving from the investor in advance the money to be loaned, before the loan was actually made (R. 12, 23).

Such loans were usually for a period of five years (R. 13, 23). In disposing of them, the respondent either assigned the bond and mortgage to the purchaser in its entirety, issuing to him at the same time its regular policy of mortgage guaranty, Exhibit T (R. 21, 22), or, especially in the case of large mortgages, it assigned fractional interests or participations in the mortgage (*id.*), in which case it issued to the purchaser

a so-called "Guaranteed First Mortgage Certificate" in the form of Exhibit U (R. 61-63). This Certificate combined an assignment of an interest in the specified mortgage with a guaranty similar in terms and operation to the regular policy, Exhibit T. Since 1918, participations evidenced by such Certificates have been legal investments for executors and trustees in New York (see L. 1918, ch. 544).

In disposing of such loans, the respondent invariably issued either its regular form of policy, Exhibit T, or its Guaranteed First Mortgage Certificate, Exhibit U (R. 12, 23). In neither case did it make any profit on the sales by selling mortgages for more than face value or more than the amount actually advanced (*id.*). The primary object of the respondent in making such loans was, concededly, the sale of the bonds and mortgages, with its guaranties (*id.*). The same general method of doing business was followed by the other companies engaged in guaranteeing mortgages in New York State, except subsidiary companies not dealing with the public (R. 13, 24).

The lending and extension fees were at the prevailing rates charged by other lenders (R. 13, 31), the rates for building loans being higher on account of the constant inspection necessary (*id.; cf.,* building loan contract, Exhibit R, R. 41-52). Commencing with the year 1921, there was a marked increase in building activity in New York City and a corresponding increase in the demand for mortgage loans, especially building loans (R. 14, 32). The result was reflected in the respondent's income from lending and extension fees, which, as the Government's letter denying the claims for refund shows (Exhibit M, R. 36), gradually increased from $89,821 in 1918 to $848,543 in 1922 and $1,033,313.80 in 1923.

Statute Involved, and Question Presented.

Prior to 1921, the Revenue Acts had imposed income and capital stock taxes on all domestic corporations, except those expressly exempted; and such taxes were continued by Sections 230 and 1000, respectively, of the Revenue Act of 1921. That Act, however, placed insurance companies in a separate class by imposing special income taxes upon them, "in lieu of the taxes imposed by Sections 230 and 1000", and exempting them from the payment of capital stock taxes. The special income taxes, which were at the same rate as that for other corporations, were imposed by Section 243 on "every life insurance company" (the term "life insurance company" being defined in Section 242) and by Section 246, commencing with the year 1922, upon "every insurance company (other than a life or mutual insurance company)", there being no definition of the term "insurance company". Section 1000, subdivision (b), specifically provided that on and after July 1, 1922, the capital stock taxes imposed by that section should not apply "to any insurance company subject to the tax imposed by section 243 or 246", which is the provision involved on the present appeal. The material portions of the statute are set forth in full in Appendix A of this brief (*infra,* pp. 35-39) and are discussed in detail hereafter (*infra,* pp. 15-20). Capital stock taxes on other corporations were finally repealed by the Revenue Act of 1926 (Sec. 1200, a, repealing Title VII of the Revenue Act of 1924).

The respondent inadvertently continued to file returns and pay capital stock taxes for two years following the enactment of the Revenue Act of 1921. It then

filed claims for refund, which were denied (Exhibit W, R. 64; Exhibit M, R. 35-39); and this action was brought to recover the amounts paid. The facts were stipulated (R. 7-15); and the sole question presented to this Court is whether the Courts below were right in holding, on the stipulated facts, that the respondent was entitled to classification as an insurance company under the provisions of the Revenue Act of 1921 above referred to.

Summary of Argument.

The respondent was concededly an insurance company, under the laws of the State of New York. Its business was insurance, in the commonly accepted meaning of that term, and had been taxed as insurance under the preceding Revenue Acts. The statute was clearly intended to apply to insurance companies recognized as such under State laws, and no orderly enforcement of the statute would have been possible under any other construction, on account of the different fiscal periods covered by the income tax and the capital stock tax. There is in any event no reason for excluding the respondent from such classification.

Argument.

FIRST.

The respondent was an insurance company, under the laws of the State of New York.

It is conceded that the respondent has always been an insurance company under the laws of the State of New York. It was incorporated as such in 1893 (R. 7, 18). It has always been subject to all the provisions of the Insurance Law (R. 8, 19) and has maintained the guaranty fund required by that Law (R. 14, 25). The annual reports of the State Superintendent of Insurance, of which it is agreed the Court may take judicial notice (R. 14, 32), show that its accounts have been audited and published regularly as those of an insurance company, ever since its incorporation. Counsel for the petitioner makes no claim that the business done by the respondent was not expressly authorized by the New York Insurance Law.

It is, therefore, established that for nearly thirty years prior to the passage of the Revenue Act of 1921, the respondent had been specifically classed as an insurance company and known as such under the laws of the State of New York.

SECOND.

Mortgage insurance is recognized branch of insurance.

I. Not only in New York, but in other States, mortgage insurance is a well recognized form of insurance. In *The People* v. *Potts,* 264 Ill. 522, where the question at issue was whether a corporation about to be organized for the purpose of guaranteeing mortgages should be incorporated as a casualty insurance company or as a guaranty insurance company, the Court after an extended discussion of the subject said (p. 527):

> "Manifestly, under these authorities the purposes for which the relators desire to incorporate might be classed either as guaranty insurance or casualty insurance. An examination of the insurance laws of the various States authorizing the incorporation of companies shows that in some States the class of insurance business proposed to be done by relators may be carried on by guaranty insurance companies, in others by casualty insurance companies, and in still others by either class of companies. In this State companies incorporated under different acts can do, in part, the same kind of business. Under whatever name they are known such contracts are regarded as insurance contracts, and, as such, subject to the rules of construction applicable to insurance policies generally, and not to the rules applied to ordinary guaranty or surety contracts for accommodation. *United States Fidelity Co.* v. *First Nat. Bank,* 233 Ill. 475; Frost on Guaranty Insurance, (2d ed.) sec. 3. * * *"

(p. 528.) "No authority called to our attention would prevent classifying under the term 'guar-

anty insurance' the guaranteeing of loss for the non-payment of notes or other contracts of like nature."

II. The attempt made in the Government's brief to draw a fine-spun distinction between insurance and guaranty is quite beside the point in the present case.

In the first place, where the insurance relates to the payment of a sum of money only, as in mortgage insurance, no hard and fast line can be drawn. Frost, on Law of Guaranty Insurance (2d ed.), traces in his introduction the history of guaranty insurance and states (p. 16):

> "There is no hard and fast line to be drawn between contracts of insurance and contracts of guaranty."

For further discussion of what constitutes insurance, see

The People v. *Rose,* 174 Ill. 310;
Note to 47 L. R. A. (N. S.) 290;
Note to 63 A. L. R. 711;
Aetna Casualty & Surety Co. v. *Commercial State Bank,* 13 F. (2d) 474;
Tebbets v. *Mercantile Credit Guarantee Co.,* 73 Fed. 95;
Hunt v. *New Hampshire Fire Underwriters' Ass'n,* 68 N. H. 305.

In *Hunt* v. *New Hampshire Fire Underwriters' Ass'n* (*supra*), quoted in Words & Phrases (Vol. 4, p. 3676), the Court said:

> "An insurance contract is a contract of indemnity. It does not differ from a bond of indem-

nity or a guaranty of a debt, since the obligor or guarantor takes upon himself certain risks to which the obligee or creditor would otherwise be exposed. The only difference is in name and form of the instrument, the consideration for an insurance being always called a 'premium', and the instrument containing the terms of the contract a 'policy'."

III. Even if any such hypertechnical distinction could be drawn, it is impossible to attribute to Congress any intention to draw such distinction. In using the term, "insurance company", without defining it, Congress must either have intended to refer to insurance companies recognized as such under State laws, or, in any event, to companies doing a business commonly recognized as insurance. The stipulation and findings show that the terms, "insure", "policy" and "premium", were commonly used in respondent's business (R. 10-12, 21-23).

Conclusive proof that mortgage insurance was an established and well recognized form of insurance is found in the two Revenue Acts immediately preceding the Revenue Act of 1921. As will be shown under the next point, those Acts specifically included *"mortgage guarantee policies"* as policies of insurance and taxed them as such.

IV. The position of the Government on the question has been constantly shifting.

1. In denying the claims for refund, the Treasury Department conceded that all the respondent's premium income from guaranteeing mortgages was income from "straight insurance business" (Ex-

hibit W, R. 64). Based upon respondent's income from lending fees and statements in its advertising matter, the theory was eventually evolved that such insurance business was only incidental to an investment business (Exhibit M, R. 35-39). In an endeavor to support that theory, the Department stated, with disregard of the facts, that the respondent "does no guaranty or insurance business for others but confines its activities in this respect to its own investment securities. * * * In other words, it insures the investment securities which it offers to the public. The insurance feature merely serves to make the investments more attractive" (R. 38-39).

2. In the District Court, as the opinion shows (R. 15, 17), the Government conceded that the respondent's guaranties of mortgages which it had never owned were pure insurance business; but the argument was made that such guaranties, when given in connection with mortgages sold by the respondent, were not insurance.

3. Before the Circuit Court of Appeals, the Government contended that none of the respondent's business was insurance; in other words, it denied the existence of mortgage insurance as such (R. 71).

4. In this Court, the Government's brief avoids any direct statement on the subject, ignoring the insurance of mortgages for others and admitting that whether the guaranties in connection with sales should be considered insurance "is a matter of considerable doubt" (Petitioner's Brief, pp. 28, 23-31).

THIRD.

The statute and its history.

I. *Prior statutes.*

As just pointed out, the war taxes imposed by the two preceding Revenue Acts of 1917 and 1918 included taxes on insurance. The provisions of both Acts were similar; and for the purpose of this discussion, only the provisions of the Revenue Act of 1918 will be cited. The taxes were imposed by Section 503, insurance being classified under the three general groups of (a) life insurance, (b) fire and marine insurance, and (c) casualty insurance, including all other branches. The tax on the latter was at the rate of 1 cent for each dollar of premium.

The Act also imposed a stamp tax on "Bonds, indemnity and surety" (Title XI, Schedule A, subd. 2); and the tax on casualty insurance (Sec. 503, c) expressly excepted "bonds and policies taxable under subdivision 2 of Schedule A of Title XI".

The tax on bonds imposed by subdivision 2 of Schedule A of Title XI was a flat tax of fifty cents on various surety and indemnity bonds "and on all policies of guaranty and fidelity insurance, including policies guaranteeing titles to real estate and mortgage guarantee policies * * *. *Provided*, That where a premium is charged for the issuance, execution, renewal or continuance of such bond the tax shall be 1 cent on each dollar or fractional part thereof of the premium charged". The material parts of those sections are printed in full as Appendix B of this brief (*infra*, pp. 40-41).

Here, then, was an express classification of *"mortgage guarantee policies"* with other policies of insurance, as

distinguished from ordinary guaranties, and a tax imposed upon them at the casualty insurance rate of one cent for each dollar of premium. As the stipulation and findings show, the Treasury Department ruled that policies in the form of respondent's Exhibit T and Exhibit U should be taxed at the premium rates on the aggregate premiums, instead of the flat tax of fifty cents imposed on ordinary surety or guaranty bonds, and the respondent and other companies duly paid stamp taxes in accordance with such ruling (R. 14, 24). That is, on a policy insuring a five year mortgage for $100,000, instead of the flat tax of fifty cents imposed on indemnity and surety bonds, the tax was $25, computed at one cent per $1 of premium on premiums aggregating $2,500 (*i. e.*, five years' premiums at ½ of 1%, or $500, per year), and payable at once, whether the premiums were subsequently collected or not.

The mortgage insurance policies issued by the respondent and other companies having thus been expressly described as insurance and taxed as insurance under the two Revenue Acts immediately preceding the Revenue Act of 1921, how can the Government now claim with any semblance of plausibility that the policies issued by the respondent were not insurance policies in the recognized meaning of that term and that the words "every insurance company (other than a life or mutual insurance company)" in the Revenue Act of 1921 should be construed to exclude the respondent doing exclusively such mortgage insurance business?

Counsel for the petitioner make no attempt to meet that argument in their brief, although the 1918 Act is casually cited at pages 20-21, presumably to forestall any charge that it had been overlooked.

II. *Taxation of insurance companies in Revenue Act of 1921.*

The Revenue Act of 1921 repealed the tax on insurance (Sec. 1400-a) and also omitted the tax on surety and indemnity bonds (and mortgage guaranty policies) imposed by subdivision 2 of Schedule A, Title XI. As already explained, insurance companies were placed in a special class for income taxation (Secs. 242-247) and were exempted from capital stock tax (Sec. 1000, b).

The bill as originally introduced contained special provisions applicable only to life insurance companies. The Ways and Means Committee of the House, in reporting the original bill, stated:[1]

> "The provisions of the present law applicable to life insurance companies are imperfect and productive of constant litigation. * * * The new tax would yield a larger revenue than the taxes which it is proposed to replace."

A similar statement was made by the Senate Finance Committee, in reporting the bill to the Senate.[2] Prior to its enactment, the special classification was extended to all insurance companies, Sections 242-245 applying to "every life insurance company" and Sections 246-247 applying to "every insurance company (other than a life or mutual insurance company)". Those words show beyond any question the intention to include in the special classification *every* insurance company (except mutual insurance companies other than life, as to which

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1 67th Congress, 1st Session, Report No. 350, p. 14.
2 67th Congress, 1st Session, Senate Report No. 275, p. 20.

special provisions were inserted in the sections applicable to business corporations, *e. g.*, Sec. 234, a. 10-13, incl.).

III. *Purpose of special classification.*

Counsel for the Government offer no logical explanation of this special classification of insurance companies; but it is submitted that the obvious intention of the statute was to prevent litigation by requiring their income tax returns to be made in accordance with their annual reports to State Insurance Departments, as the references in Section 246 to the "annual statement approved by the National Convention of Insurance Commissioners" show.

Insurance companies are subject to State supervision and are required to keep their accounts in the manner prescribed by the various State Insurance Departments. Such accounting differs materially from the accounting rules applicable to ordinary business corporations. For example, the premiums received by an insurance company (whether for life insurance, fire insurance, or mortgage insurance) are its compensation for assuming a risk which ordinarily lasts for several years and which may require the payment of a loss far exceeding the total premiums collected on the policy. Under the ordinary rules of law and accounting applicable to business corporations, it is doubtful whether any part of such premium could lawfully be taxed as income in a given year, prior to the termination of the risk; but under the accounting system prescribed by State Insurance Departments and followed by insurance companies, the annual income from premiums is determined under special rules of accounting, with special reserves required. Since the passage of the original Excise Tax

Act of 1909, many cases have come before this Court involving the difficulty of determining the taxable income of insurance companies, under their distinctive methods of accounting, *e. g.*

McCoach v. *Insurance Co. of N. Amer.*, 244 U. S. 585;
Maryland Casualty Co. v. *United States*, 251 U. S. 342;
United States v. *Boston Insurance Co.*, 269 U. S. 197;
New York Ins. Co. v. *Edwards*, 271 U. S. 109.

IV. *Directions for computing net income.*

Section 246 based the computation of the net income of insurance companies, other than life and mutual companies, on the underwriting and investment exhibit of the annual statement approved by the National Convention of Insurance Commissioners. The National Convention of Insurance Commissioners is, of course, the National Convention of the Insurance Commissioners of the various States; and if this Court can and will take judicial notice of the annual statements approved by the Convention, as the statute seems to require, it will find that separate forms (commonly called "Convention Edition" forms and used by insurance companies in making their annual reports to the State Departments of Insurance) had been approved for (a) life insurance companies, (b) fire and marine insurance companies, and (c) miscellaneous insurance companies. The approved forms, therefore, covered the same three general classes of insurance which had been recognized and taxed in the two preceding Revenue Acts; and they were obviously

intended to cover all varieties of insurance companies—a clear indication that Section 246 was intended to apply to every insurance company (other than a life or mutual insurance company) filing annual reports with State Insurance Departments.

By far the largest single group of insurance companies falling within the provisions of Section 246 consisted of course of fire and marine insurance companies; and the detailed directions in Subdivision (b) of Section 246 for computing net income were naturally designed primarily for them. The provisions for computing underwriting income from premiums and, in general, the other provisions of the Section, corresponded with the accounting methods required in the Convention Edition for fire and marine insurance companies—another clear indication that the purpose of the statute was to require the income tax returns of insurance companies under Section 246 to be prepared in accordance with their annual statements to the State Insurance Departments.

Those provisions are not directly involved on the present appeal; but the Government has argued at various times that, since fees were not expressly mentioned in subdivision (b), the respondent and other mortgage insurance companies would escape taxation on their lending and extension fees, if they were held to be insurance companies within the meaning of Section 246. The argument is made in this Court only by suggestion. It is conceded that the respondent has never made any such contention (Petitioner's Brief, p. 39); and the record shows that the respondent voluntarily reported such fees as income in its returns for 1921, 1922 and 1923 (R. 9, 20), though its return for 1923 was not filed until March 15, 1924 (*id.*), several months after its

claims for refund of capital stock tax, which were filed in November, 1923 (R. 8-9, 19-20).

The suggestion that such fees would escape income tax is a transparent argument *in terrorem*. The Convention Edition for miscellaneous companies in use in 1921 contained in the income exhibit special items for "Policy fees required or represented by applications", and for "Inspections", and also income from miscellaneous sources; and the same items were repeated in the underwriting and investment exhibit, so that there can be no claim that such fees were not shown in the annual statement for miscellaneous companies. In New York, the State Insurance Department had provided a special form for Title and Mortgage Guaranty companies organized under Section 170, Article V. of the Insurance Law, so that such insurance companies did not use the Convention Edition for their annual reports. Copies of the respondent's reports on such forms for 1921 and 1922 were admitted in evidence (Exhibits D and E, R. 8, 19), showing such fees as income; and it is not disputed that the respondent's income tax returns were prepared in accordance with those reports, including such fees. The Board of Tax Appeals has also held that income tax returns under Section 246 should be prepared on the basis of the annual statement, and that fees, of a somewhat different nature, should be included as income in a return made by an insurance company under Section 246.

> *Massachusetts Protective Association, Inc.* v. *Commissioner*, 18 B. T. A. 810, 816; Acq. X-1C B 41.

In addition, if the respondent, or any other mortgage insurance company, should ever claim that such

fees were excluded from gross income under the literal wording of Section 246, they would undoubtedly be met by the argument, not only that the statute required their income tax returns to be prepared in accordance with their annual statements, but also that such fees, if they exceeded the actual expenses of inspection and appraisal, were equivalent to additional interest and so were within the literal language of the statute requiring interest income to be reported.

FOURTH.

Section 246 must be construed to apply to insurance companies incorporated as such under State law.

I. As demonstrated under the preceding point, the term, "every insurance company (other than a life or mutual insurance company)", was obviously intended to include every insurance company recognized as such by State laws; and that may well have been the reason why there was no definition of the term.

That construction is the only one which will give any rational or orderly interpretation of the statute, as a whole. It is inconceivable that Congress intended to include in the classification of insurance companies any corporation not organized as an insurance company under State laws; and it is almost equally inconceivable that Congress intended to require, or permit, the Treasury Department to examine into the business of every State insurance company filing income tax returns in accordance with its annual statements to State Insurance Departments and arbitrarily to refuse to recognize as an insurance company any company having income which the Department considered was not income from purely insurance business. The business and income of every corporation fluctuate; and insurance companies concededly entitled to classification as such often receive incidental income from allied activities.

In passing upon another case, the Solicitor of Internal Revenue ruled that a title insurance company incorporated in New York under Section 170 of the Insurance Law was entitled to classification as an insur-

ance company under Section 246 (of the Revenue Act of 1924), despite incidental income from fees, saying:

> "In view of all the foregoing, it is apparent that the income of the M Company is derived from the issuance of contracts of insurance and sources fairly incidental to what is an insurance business. It is true that a substantial part of the income of this company is derived from fees for searching and examining titles, not strictly insurance functions, yet it appears that these examinations are made solely as preliminary steps to the issuance of insurance contracts. This office is, therefore, of the opinion that a corporation so organized and operated is an insurance company within the meaning of section 246 of the Revenue Act of 1924 and entitled to file returns as an insurance company thereunder" (S. M. 5501, Cumulative Bulletin V-1 [June, 1926], 102, at p. 104).

The same language is applicable to the present case; for the respondent's lending and extension fees, covering its appraisals and inspections, were clearly incidental and preliminary steps to the sale of the mortgages and the issuance of its mortgage insurance. As pointed out in detail later (*infra*, p. 26), the annual reports of the New York State Superintendent of Insurance, of which it was stipulated that the Court might take judicial notice (R. 14), show the fluctuations of such incidental income of insurance companies in New York State, alone. In the respondent's own case, its income from fees in 1918 was only $89,821, out of a gross income of over $1,000,000 (R. 36). If the right to classification as an insurance company were made to depend upon the size of such incidental income, then

under any arbitrary rule which the Government might attempt to establish, the status of many corporations would inevitably change from year to year—a result which it is impossible to believe Congress had in mind.

II. Moreover, any such arbitrary classification would have resulted in chaos, when applied to the capital stock tax. That tax, as explained at length in the Treasury Regulations, was prospective, payable in advance on a return due in July for the privilege of doing business during the Government fiscal year from July 1 to the following June 30 (Regs. 64, Arts. 2, 14, 20), whereas income taxes were assessed on the calendar year basis. Obviously, under any such arbitrary classification, no insurance company could possibly determine in advance in July, when capital stock tax returns were due, whether or not its business for the remaining six months of that calendar year and the first six months of the following calendar year would result in its being classed as an insurance company for income tax purposes for either or both calendar years; and, as just pointed out, under any such arbitrary classification, its status for income tax purposes might not be the same in the two calendar years.

III. For all those reasons, the term, "every insurance company", in Section 246 must obviously be construed as meaning insurance companies recognized as such under State laws; and that construction is not only sanctioned but directly required under the decision of this Court in *United States* v. *Loan & Bldg. Co.*, 278 U. S. 55, discussed under a separate point later in this brief (*infra*, pp. 30-32).

FIFTH.

Government's contentions answered.

I. The substance of the Government's argument is, that the respondent was engaged in a mortgage investment business quite distinct from that of an insurance company and which prevents it from being classed as an insurance company, in the ordinary meaning of that term. At the outset of the Government's brief, stress is laid upon the fact that the respondent described its business as "Guaranteed Mortgages" in its tax returns. As will be explained later, that description was not inconsistent with its right to be classed as an insurance company; and the statement that the respondent did not claim to be an insurance company in its income tax returns (Brief, p. 3) is hardly supported by the record. During 1921, 1922 and 1923, the same form of income tax return was used by both ordinary business corporations and insurance companies. The respondent made its returns on that form, in accordance with its annual statements to the New York Insurance Department, which, as already pointed out, was the basis prescribed for insurance companies by Section 246.

II. As to the nature of the respondent's business, the argument in the Government's brief entirely ignores the insurance for others of mortgages which the respondent never owned, which was conceded in the District Court to be purely insurance business (R. 15, 17). Before the Circuit Court of Appeals, it was argued that even such business was not insurance (R. 71); but that contention was thoroughly rebutted by the opinions of the Circuit Court of Appeals. In this Court, the subject is ignored

in the Government's argument; but it is submitted that, beyond any question, this Court must recognize such business as insurance, for the reasons already stated.

If the guaranteeing of mortgages which the respondent never owned was insurance, then the guaranteeing of mortgages under the same form of policy for the same premium was equally insurance, regardless of the fact that the respondent had previously owned the mortgages. That was a development of the business expressly authorized, and undoubtedly contemplated by the amendments to the New York Insurance Law in 1911 and 1913.

III. Petitioner's brief stresses the fact that two corporations incorporated under the Banking Law of New York make mortgage loans and sell mortgages with their guaranty under the same general method of doing business as the respondent. It is quite true that investment companies organized under the Banking Law of the State of New York are authorized to deal in mortgages, as well as other forms of investment; but the business is one which can be done only by a moneyed corporation (*i. e.*, a corporation formed under the Banking Law or the Insurance Law).

Op. Att'y Gen. of New York (1893), page 182.

Such investment companies formed under the Banking Law cannot, of course, insure mortgages for others, which is still a substantial feature of respondent's business (R. 12, 23); and the fact that the sale of guaranteed mortgages is a business which may be engaged in only by moneyed corporations and not by ordinary business corporations certainly does not strengthen petitioner's claim that the respondent should be regarded as an ordinary business corporation. As against two corpora-

tions formed under the Banking Law, the annual report of the New York State Superintendent of Insurance for the year 1928 (the year before the stipulation was signed) shows that, of the forty-five title and mortgage guaranty companies incorporated in New York, at least thirty-one of them received premiums for mortgage guaranties (New York Insurance Report, 1929, Part III, pp. 719-813). The amounts ranged from $71.82, received by the Western New York Title and Guaranty Company, of Buffalo, out of a total gross income of $133,458.54 (*id.*, p. 812), to $3,292,164.16, received by the Bond and Mortgage Guarantee Company, of Brooklyn, out of a total gross income of $4,751,316.54 (*id.*, p. 725). Every one of the forty-five companies (except one not fully organized) received income from fees; and there were equally wide variations in the nature and relative size of the various fees collected. Many of the forty-five companies were engaged wholly or primarily in title insurance—a form of insurance unquestionably entitling them to be classed as insurance companies; and the figures show clearly how hopeless it would be to attempt to establish any logical or uniform rule barring any of them from classification as an insurance company. No claim is made by the Government that any such rule has ever been promulgated or even formulated.

It follows that the respondent's description of its business as "Guaranteed Mortgages" did not indicate in any way that the respondent was not an insurance company. On the contrary, it indicated a business done almost exclusively by insurance companies, in which ordinary business corporations were not permitted to engage; and it also called attention to the fact that the respondent did no title insurance business.

Moreover, the primary object of investment companies, as distinguished from insurance companies, is to make profits by selling securities at a higher price than the price paid for them; but it is conceded that the respondent makes no such profits on the sale of mortgages (R. 12, 23). Its principal income was from three sources, namely (R. 36):

(1) Lending and extension fees;

(2) Interest on mortgages and other securities; and

(3) Premiums.

(1) As to lending and extension fees, not only insurance companies, but individuals and corporations of all kinds, savings banks in particular, make mortgage loans and collect such fees. The size of such fees is determined by current rates and may or may not exceed the actual cost of appraisals and inspections. It certainly cannot be claimed that either the respondent or other lenders were making mortgage loans on account of the income to be derived from such fees; and it is conceded in the present case that the primary purpose of the respondent in making such loans was the sale of the mortgages, with its insurance (R. 12, 23).

(2) The purpose for which savings banks and other investors make mortgage loans is, of course, the interest income to be derived from holding them as investments; but aside from the securities which it was required to hold under the Insurance Law, that was not the respondent's purpose, since its purpose was to sell the mortgages, not to hold them for investment (R. 12, 23).

(3) It necessarily follows that the object of all the respondent's so-called "investment" business was the pre-

mium income derived from its insurance. The findings expressly show that, in assigning mortgages, the respondent *always* issues its policy, Exhibit T, or its certificate, Exhibit U (R. 12, 23). The advertising matter issued by the respondent in endeavoring to increase its sales of mortgages and hence its insurance obviously has no legal significance; and the statement quoted at page 23 of the Government's brief (that the sole business of the respondent was to supply conservative investors with first mortgages with principal and interest fully guaranteed by the respondent) was undoubtedly intended to call attention to the fact that the respondent did not engage in any other form of insurance (as many other insurance companies did), so that its entire assets were behind its policies of mortgage guaranty.

IV. It is submitted that, even if the Government might conceivably be justified in some exceptional cases in refusing to recognize State classification, no ground exists for disregarding it in the present case. The respondent's business was essentially insurance, from the time it was incorporated in 1893; and it was a business commonly and regularly done by insurance companies.

The numerous innuendoes in the petitioner's brief as to the effect that such classification might have on other cases and taxes do not require serious consideration. So far as income taxes are concerned, those innuendoes have already been shown to be without foundation (*supra*, pp. 18-20). The suggestion that stamp tax cases may also be affected (Petitioner's Brief, p. 20) is equally without foundation. In *Mortgage Guarantee Co.* v. *Welch*, 38 Fed. (2d) 184, cert. den. 281 U. S. 759, the Mortgage Guarantee Company had issued obligations with fixed

interest dates and rates, secured by several millions of dollars of mortgages deposited with a Trustee in a revolving fund. The decision that such obligations were subject to stamp tax as corporate securities did not depend in any way upon whether the Mortgage Guarantee Company was or was not entitled to classification as an insurance company under the Revenue Acts. Liability for stamp tax in that and other cases depends upon the form of the obligation, not upon the identity or classification of the corporation which issues it.

V. The entire argument made by the Government in the present case in attempting to avoid refund of capital stock taxes is exactly parallel to the argument made by the Government and rejected by this Court in the *Cambridge Loan and Building Company* case, which will now be considered.

SIXTH.

United States v. _Loan & Bldg. Co._, 278 U. S. 55, is controlling and conclusive.

In the case cited above, the question before the Court was whether the Cambridge Loan and Building Company, a building and loan association incorporated under the laws of the State of Ohio, was exempt from Federal income tax under Section 231 (4) of the Revenue Act of 1918 and the Revenue Act of 1921, exempting "Domestic building and loan associations * * *". The purpose of the exemption was undoubtedly to relieve from income tax associations formed to enable members to buy or build homes of their own; and the Government, having analyzed the business of the corporation and found that its principal business was making loans to, and receiving deposits from, persons not members, claimed that the company was in fact doing a banking business, and so should pay income tax like other corporations engaged in banking and was not entitled to exemption as a building and loan association. In other words, the Government claimed in that case, with much more justification, exactly what it is claiming in the present case, namely: the right to disregard State classification and the ordinary interpretation of terms in common use and substitute an analysis of the business done, under arbitrary standards of its own, in enforcing the Revenue Acts.

In holding that the Company was exempt, this Court said (p. 58):

> "Under the Ohio statute the respondent has these powers, and still, as we have said, is called a building and loan association by that State.

> The same name was commonly used in other States and similar powers were given with more or less restriction. When Congress exempted such associations from the income tax of course it was speaking of existing societies that commonly were known as such, not of ideals that would have been hard to find."

In answer to the argument that such associations might be used as a mask to escape taxation, the Court said (p. 59):

> "The present taxes are upheld by the Government on the ground that the respondent is such a mask. It is argued that even admitting all that has been said thus far, a State cannot make a bank exempt merely by calling it a building and loan association. No doubt extravagant cases might be imagined. But these associations are well known and a State is not likely to be party to a scheme to enable a private company to avoid federal taxation by giving it a false name. The statutes speak of 'domestic' associations, that is, associations sanctioned by the several States. They must be taken to accept, with the qualifications expressly stated, what the States are content to recognize, unless there is a gross misuse of the name. The State of Ohio has recognized and still recognizes the respondent as belonging to the class which its name indicates. Very possibly the company has strained its privileges to near the limit, but we are not prepared to condemn the nomenclature adopted by the State."

That language and argument (except the last sentence) apply exactly to the construction to be given the words, "insurance company", in Section 246 of the Revenue Act of 1921, now under consideration; and the

word "domestic" was also used in Section 246. Whatever may be said as to the nature of respondent's business in the present case, there can be no possible claim that its incorporation as an insurance company was a mask to escape taxation. It has been incorporated and engaged in business under the same State law for nearly thirty years prior to the passage of the Revenue Act of 1921. Paraphrasing Justice Holmes' language:

> "When Congress exempted insurance companies from capital stock tax, of course it was speaking of existing societies that commonly were known as such, not of ideals that would have been hard to find."

There were much stronger arguments in support of the Government's position in the *Cambridge Loan and Building Company* case than there are in the present case. Concededly, the *Loan and Building Company* was doing a banking business which building and loan associations were not ordinarily authorized to do and which was entirely foreign to the purpose for which they had been exempted from income tax. If the Company was classed as a building and loan association, it escaped income tax entirely, whereas corporations in the same and other States doing exactly the same class of business were subject to income tax as banking corporations.

In the present case, the respondent is not seeking to escape income tax. It was doing only the usual kind of mortgage insurance business which insurance companies in New York and other States had been doing for years, and which had been expressly taxed as insurance under the two preceding Revenue Acts. In addition, in the present case the statute showed clearly the intention to base the classification on State law.

SEVENTH.

Conclusion.

The question at issue is the construction of the term, "insurance company", as used in the Revenue Act of 1921.

I. The term was obviously intended to apply to insurance companies incorporated as such under State laws. That construction gives an intelligible and workable construction of the statute and is sanctioned, and directly required, by the decision of the Supreme Court in the *Cambridge Loan and Building Company* case.

II. If the State classification is not adopted, what is the alternative? A purely arbitrary classification by the Treasury Department, which would have resulted in confusion worse confounded, especially since capital stock taxes and income taxes were not imposed for the same fiscal periods.

III. Under any proper basis of classification, the respondent must be classed as an insurance company in any event. Having previously been taxed by Congress on its policies of mortgage guaranty as policies of insurance, so designated in the two preceding Revenue Acts, there can be no valid basis for excluding it from classification as an insurance company under the Revenue Act of 1921.

EIGHTH.

The judgment below should be affirmed.

January, 1932.

Respectfully submitted,

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Appendix A.

EXTRACTS FROM REVENUE ACT OF 1921.

Title X.—Special Taxes. *Capital Stock Tax.*

Sec. 1000. (a) That on and after July 1, 1922, in lieu of the tax imposed by Section 1000 of the Revenue Act of 1918——

(1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to $1 for each $1,000 of so much of the fair average value of its capital stock for the preceding year ending June 30 as is in excess of $5,000. In estimating the value of capital stock the surplus and undivided profits shall be included;

* * * * * * * * *

(b) The taxes imposed by this section shall not apply in any year to any corporation which was not engaged in business (or, in the case of a foreign corporation, not engaged in business in the United States) during the preceding year ending June 30, nor to any corporation enumerated in section 231, nor to any insurance company subject to the tax imposed by section 243 or 246.

FROM TITLE II—INCOME TAX.

Sec. 243. That in lieu of the taxes imposed by sections 230 and 1000 and by Title III, there shall be levied, collected, and paid for the calendar year 1921 and for each taxable year thereafter upon the net income of every life insurance company a tax as follows:

* * * * * * * * *

Sec. 246. (a) That, in lieu of the taxes imposed by sections 230 and 1000, there shall be levied, collected and paid for the calendar year 1922, and for each taxable year thereafter, upon the net income of every insurance company (other than a life or mutual insurance company) a tax as follows:

(1) In the case of such a domestic insurance company the same percentage of its net income as is imposed upon other corporations by section 230;

(2) In the case of such a foreign insurance company the same percentage of its net income from sources within the United States as is imposed upon the net income of other corporations by section 230.

(b) In the case of an insurance company subject to the tax imposed by this section——

(1) The term "gross income" means the combined gross amount, earned during the taxable year, from investment income and from underwriting income as provided in this subdivision, computed on the basis of the underwriting and investment exhibit of the annual statement approved by the National Convention of Insurance Commissioners;

(2) The term "net income" means the gross income as defined in paragraph (1) of this subdivision less the deductions allowed by section 247;

(3) The term "investment income" means the gross amount of income earned during the taxable year from interest, dividends, and rents, computed as follows:

To all interest, dividends and rents received during the taxable year, add interest, dividends and rents due

and accrued at the end of the taxable year, and deduct all interest, dividends and rents due and accrued at the end of the preceding taxable year;

(4) The term "underwriting income" means the premiums earned on insurance contracts during the taxable year less losses incurred and expenses incurred.

(5) The term "premiums earned on insurance contracts during the taxable year" means an amount computed as follows:

From the amount of gross premiums written on insurance contracts during the taxable year, deduct return premiums and premiums paid for reinsurance. To the result so obtained add unearned premiums on outstanding business at the end of the preceding taxable year and deduct unearned premiums on outstanding business at the end of the taxable year;

(6) The term "losses incurred" means losses incurred during the taxable year on insurance contracts, computed as follows:

To losses paid during the taxable year add salvage and reinsurance recoverable outstanding at the end of the preceding taxable year, and deduct salvage and reinsurance recoverable outstanding at the end of the taxable year. To the results so obtained add all unpaid losses outstanding at the end of the taxable year and deduct unpaid losses outstanding at the end of the preceding taxable year;

(7) The term "expenses incurred" means all expenses shown on the annual statement approved by the National Convention of Insurance Commissioners, and shall be computed as follows:

To all expenses paid during the taxable year add expenses unpaid at the end of the taxable year and deduct expenses unpaid at the end of the preceding taxable year. For the purpose of computing the net income subject to the tax imposed by this section there shall be deducted from expenses incurred as defined in this paragraph all expenses incurred which are not allowed as deductions by section 247.

Sec. 247. (a) That in computing the net income of an insurance company subject to the tax imposed by section 246 there shall be allowed as deductions:

(1) All ordinary and necessary expenses incurred, as provided in paragraph (1) of subdivision (a) of section 234;

(2) All interest as provided in paragraph (2) of subdivision (a) of section 234;

(3) Taxes as provided in paragraph (3) of subdivision (a) of section 234;

(4) Losses incurred;

(5) Bad debts in the nature of agency balances and bills receivable ascertained to be worthless and charged off within the taxable year;

(6) The amount received as dividends from corporations as provided in paragraph (6) of subdivision (a) of section 234;

(7) The amount of interest earned during the taxable year which under paragraph (4) of subdivision (b)

of section 213 is exempt from taxation under this title, and the amount of interest allowed as a credit under subdivision (a) of section 236;

(8) A reasonable allowance, for the exhaustion, wear and tear of property, as provided in paragraph (7) of subdivision (a) of section 234:

(9) In the case of such a domestic insurance company, the net income of which (computed without the benefit of this paragraph) is $25,000 or less, the sum of $2,000; but if the net income is more than $25,000 the tax imposed by section 246 shall not exceed the tax which would be payable if the $2,000 credit were allowed, plus the amount of the net income in excess of $25,000.

(b) In the case of a foreign corporation the deductions allowed in this section shall be allowed to the extent provided in subdivision (b) of section 234.

(c) Nothing in this section or in section 246 shall be construed to permit the same item to be twice deducted.

Appendix B.

Extracts From Revenue Act of 1918.

Sec. 503. That from and after April 1, 1919, there shall be levied, assessed, collected, and paid, in lieu of the taxes imposed by section 504 of the Revenue Act of 1917, the following taxes on the issuance of insurance policies, including, in the case of policies issued outside the United States (except those taxable under subdivision 15 of Schedule A of Title XI), their delivery within the United States by any agent or broker, whether acting for the insurer or the insured; such taxes to be paid by the insurer, or by such agent or broker:

(a) Life insurance: * * *

(b) Marine, inland and fire insurance: * * *

(c) Casualty insurance: A tax equivalent to 1 cent on each dollar or fractional part thereof of the premium charged under each policy of insurance or obligation of the nature of indemnity for loss, damage, or liability (except bonds and policies taxable under subdivision 2 of schedule A of Title XI) issued or executed or renewed by any person transacting the business of employer's liability, workmen's compensation, accident, health, tornado, plate glass, steam boiler, elevator, burglary, automatic sprinkler, automobile, or other branch of insurance (except life insurance, and insurance described and taxed in the preceding subdivision): *Provided,* That in case of policies of insurance issued on the industrial or weekly or monthly payment plan the tax shall be 40 percentum of the amount of the first weekly premium or 20 per centum of the amount of the first monthly premium, as the case may be.

TITLE XI, SCHEDULE A, SUBDIVISION 2.

2. Bonds, indemnity and surety: On all bonds executed for indemnifying any person who shall have become bound or engaged as surety, and on all bonds executed for the due execution or performance of any contract, obligation or requirement, or the duties of any office or position, and to account for money received by virtue thereof, and on all policies of guaranty and fidelity insurance, including policies guaranteeing titles to real estate and mortgage guarantee policies, and on all other bonds of any description, made, issued, or executed, not otherwise provided for in this schedule, except such as may be required in legal proceedings, 50 cents: *Provided,* That where a premium is charged for the issuance, execution, renewal or continuance of such bond the tax shall be 1 cent on each dollar or fractional part thereof of the premium charged: *Provided further,* That policies of reinsurance shall be exempt from the tax imposed by this subdivision.

SUPREME COURT OF THE UNITED STATES.

No. 355.—October Term, 1931.

Frank Collis Bowers, as Executor of the Estate of Frank K. Bowers, formerly United States Collector, etc., Petitioner,
vs.
Lawyers Mortgage Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 14, 1932.]

Mr. Justice Butler delivered the opinion of the Court.

Respondent voluntarily paid the capital stock tax imposed on domestic corporations by § 1000, Revenue Act of 1921, 42 Stat. 294, for the fiscal years ending June 30 in 1922 and 1923. Thereafter it applied for refund on the ground that it was an insurance company taxable only under § 246, 42 Stat. 262. The claim was denied. It brought this action in the federal court for the southern district of New York to recover the amount so paid. The parties by written stipulation waived a jury and submitted the case on an agreed statement of facts. The district court gave judgment for respondent. 34 F. (2d) 504. The Circuit Court of Appeals affirmed. 50 F. (2d) 104.

The question is whether on the admitted facts respondent was an insurance company subject to the tax imposed by § 246 and therefore not taxable under §§ 230 and 1000.

Respondent was incorporated in 1893 under § 170 (1) of Article V of the Insurance Law of New York[1] as the "Lawyers Mortgage Insurance Company" to examine titles, procure and furnish information in relation thereto and guarantee or insure bonds and mortgages and the owners of real estate against loss by reason of defective titles. In 1903, "insurance" was dropped from its name. In 1905, its certificate of incorporation was amended to include the making, and guarantee of the correctness, of searches for in-

[1]Laws 1890, c. 690.

struments, liens and charges affecting real estate and the guarantee of payment of bonds and mortgages.[2] In 1913,[3] the certificate of incorporation was further amended to include authority to insure payment of notes of individuals and partnerships and bonds and other evidences of indebtedness of corporations, when secured by real estate mortgages, and to "invest in, purchase and sell, with such guarantee [of payment] or with guarantee only against loss by reason of defective title or incumbrances, bonds and mortgages, and notes of individuals or partnerships secured by mortgages . . . and bonds, notes, debentures and other evidences of indebtedness of solvent corporations secured by deed of trust or mortgages . . . ." It was subject to supervision by the state superintendent of insurance and to the laws applicable to title and credit guaranty corporations and was required to file with such superintendent statements of its condition at the end of each year.

Respondent never has insured titles. In the tax years, it carried on business as follows: Upon receiving an application for a loan it caused an appraisal of the proposed real estate security to be made and procured a title insurance company to survey the property, make a report as to title and insure the same. The borrower, having executed and delivered a bond and mortgage to respondent, received from it the amount specified therein less charges for title insurance, survey, disbursements and recording tax and less a lending fee which included the charge for appraisal. Respondent sold the mortgage loans. On the sale of a bond and mortgage as a whole, it delivered an assignable contract called "policy of mortgage guarantee" to the purchaser. On the sale of part of a loan, it issued a participation certificate assignable by indorsement and registration on respondent's books and containing substantially the same provisions as the policy. By every such policy or certificate the purchaser appointed respondent his agent to collect the principal and interest, and the latter agreed to keep the title guaranteed and the premises insured against fire and to require the owner to pay taxes, assessments, water rates and fire insurance premiums. Respondent guaranteed payment of principal, as and when collected but in any event within 18 months

[2]Laws 1904, c. 543.

[3]Laws 1913, c. 215. And see Laws 1911, c. 525.

following written demand made after maturity, and payment of interest regularly at an agreed rate usually one-half of one per cent. less than that specified in the bond. Respondent kept the difference and called it "premium." Respondent also retained the interest accruing between the making of the loans and the sale of the securities. For renewals of loans it charged extension fees.

It issued some policies of guaranty as to mortgage loans which were not made or sold by it. While substantial in amount, that part of its business constituted but a small percentage of the total. It made no assignment or apportionment of assets to the different parts of its business but used them indiscriminately in its different activities. It kept on hand sufficient bonds and mortgages to maintain the guaranty fund required by the Insurance Law. Corporations organized under the New York banking laws and subject to its banking department are authorized to make loans and sell bonds, mortgages and participations therein with their guaranties under the same general method of doing business as that of respondent. And at least two companies so organized and supervised are carrying on that business.

Pertinent provisions of the Act are printed in the margin.[4] The general rule declared by § 1000 (a) is broad enough to include

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[4] Sec. 1000 (a). . . . Every domestic corporation shall pay annually a special excise . . . . equivalent to $1 for each $1,000 of . . . . its capital stock . . .

(b) The taxes imposed by this section shall not apply . . . to any insurance company subject to the tax imposed by section . . . 246. . . .

Sec. 246 (a). That, in lieu of the taxes imposed by sections 230 and 1000, there shall be levied, collected and paid . . . upon the net income of every insurance company (other than a life or mutual insurance company) a tax as follows:

(1) In the case of such a domestic insurance company the same percentage of its net income as is imposed upon other corporations by section 230; . . .

(b) . . . (1) The term "gross income" means the combined gross amount, earned during the taxable year, from investment income and from underwriting income as provided in this subdivision, computed on the basis of the underwriting and investment exhibit of the annual statement approved by the National Convention of Insurance Commissioners;

(2) The term "net income" means the gross income as defined in paragraph (1) of this subdivision less the deductions allowed by section 247;

(3) The term "investment income" means the gross amount of income earned during the taxable year from interest, dividends and rents . . .

respondent. But, if it was an insurance company taxable under § 246, it was excepted from the general rule by subsection (b). As such corporations constitute a special class, respondent must be held liable for the capital stock tax unless clearly shown to have been an insurance company within the meaning of the Act. *Bank of Commerce* v. *Tennessee,* 161 U. S. 134, 146. *Heiner* v. *Colonial Trust Co.,* 275 U. S. 232, 235. *Choteau* v. *Burnet,* 283 U. S. 691, 696. The Act does not define "insurance company" or definitely indicate criteria by which corporations meant to be so specially dealt with may with certainty be identified. General definition is not necessary in order to determine whether, having regard to the purpose of the classification and the considerations on which it probably was made, respondent's business brought it within the special class.

Under § 230, Revenue Act of 1918, 40 Stat. 1075, insurance companies were taxed as were other business corporations. The applicable definition of gross income was comprehensive and included gains, profits and income derived from any source whatever. § 213, p. 1065. It was substantially the same in the 1921 Act. § 213, 42 Stat. 237. But § 246 of the latter Act dealt with certain classes of insurance companies separately and defined gross income to be "investment income", i. e., interest, dividends and rents, and "underwriting income", i. e., premiums earned less losses and expenses. Capital gains and income from other sources were omitted.

A statement showing respondent's lending fees, extension fees, interest and premiums follows:

Year	*Lending Fees*	*Extension Fees*	*Interest*	*Premiums*[5]
1922....	$655,283.70	$214,303.56	$372,795.12	$619,986.38
1923....	990,855.37	73,745.71	426,842.31	750,803.21

While name, charter powers, and subjection to state insurance laws have significance as to the business which a corporation is

(4) The term "underwriting income" means the premiums earned on insurance contracts during the taxable year less losses incurred and expenses incurred; . . .

[5]These amounts are derived from interest collected by respondent from borrowers in excess of the rates payable to purchasers under the contract of sale and from charges on policies covering mortgage loans not made or sold by it.

authorized and intends to carry on, the character of the business actually done in the tax years determines whether it was taxable as an insurance company. *United States* v. *Phellis*, 257 U. S. 156, 168. *Weiss* v. *Stearns*, 265 U. S. 242, 254. Evidently that was the basis of the classification. Congress did not intend to exempt from the capital stock tax under § 1000 (a) and the income tax under § 230 corporations not doing insurance business even though organized under and subject to state insurance laws.

The dropping of "insurance" from respondent's name and the extension of charter powers to the purchase and sale of mortgage loans suggest purpose to carry on an investment rather than an insurance business. Respondent did not consider itself an insurance company taxable under § 246 until after it had twice made and paid capital stock taxes under § 1000 (a) and income taxes under § 230. The lending of money on real-estate security, the sale of bonds and mortgages given by borrowers and use of the money received from purchasers to make additional loans similarly secured constituted its principal business. Undoubtedly the guaranties contained in the policies and participation certificates were in legal effect contracts of insurance. *Tebbets* v. *Mercantile Credit Guarantee Co.*, 73 Fed. 95, 97. *Guarantee Co.* v. *Mechanics' Sav. Bank & Trust Co.*, 80 Fed. 766, 772. *State ex rel. Peach Co.* v. *Bonding & Surety Co.*, 279 Mo. 535, 553, 556. *The People* v. *Potts*, 264 Ill. 522, 527. *The People* v. *Rose*, 174 Ill. 310. *Commonwealth* v. *Wetherbee*, 105 Mass. 149, 160. *Shakman* v. *United States Credit System Co.*, 92 Wis. 366, 374. *Young* v. *American Bonding Co.*, 228 Pa. 373, 380. These guaranties furnished purchasers additional security and were calculated to make the loans desirable as investments and readily saleable at a profit.

The lending fees, extension fees and accrued interest appertain to the business of lending money rather than to insurance and may not reasonably be attributed to the subordinate element of guaranty in respondent's mortgage loan business. The so-called premiums amount to about one-third of total income but they cover agency and other services which generally are not performed under contracts of insurance. There is no showing that these amounts do not include profits arising from such sales or that they are justly chargeable or were intended to apply only to the risks

covered. Respondent has not established any basis upon which the interest so retained may reasonably be charged or apportioned to the element of insurance involved in such transactions. And the stipulation in respect of policies issued on loans not made by respondent is too vague to be given weight.

"Premiums" are characteristic of the business of insurance, and the creation of "investment income" is generally, if not necessarily, essential to it. Section 246 does not cover any other class of income. It is not shown that respondent had any investment income within that section. Evidently its guaranties produced less than one-third of its income.

Respondent's business is one which may be and is in fact carried on by corporations organized under the New York banking laws. The element of insurance may not properly be regarded as more than an incident thereof; it certainly is not sufficient to make respondent an "insurance company" within the meaning of that phrase as it is commonly used and understood. There is no warrant for holding that Congress intended to use the expression in any other sense. *Miller* v. *Robertson*, 266 U. S. 243, 250. *Sacramento Navigation Co.* v. *Salz*, 273 U. S. 326, 329-330.

This case is not, as respondent contends, ruled against the Government by *United States* v. *Loan & Bldg. Co.*, 278 U. S. 55. The opinion in that case shows that loan and building associations exempt from taxes under Revenue Acts of 1918 and 1921 are not strictly confined to the raising of funds by subscription of members for the making of advances to members to enable them to build or buy houses of their own, that the outside operations of the association there considered were not so related to mere money making as to constitute a gross abuse of the name and that the receiving of deposits on interest and making of loans to non-members did not disqualify it for the exemption.

In the case before us respondent's charter authority extended not only to the business of insurance but also to other lines including that of investment with or without guaranties as it might choose. As above shown, the element of guaranty involved in its transactions in the tax years was not sufficient to make it an insurance company.

Judgment reversed.